



THIRTY-EIGHTH PARLIAMENT

REPORT 18

STANDING COMMITTEE ON LEGISLATION

**LOCAL GOVERNMENT AMENDMENT (REGIONAL
SUBSIDIARIES) BILL 2010**

Presented by Hon Michael Mischin MLC (Chair)

September 2011

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
- 4.2 The Committee consists of 5 members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the House or under SO 125A.
- 4.4 Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill.”

Members as at the time of this inquiry:

Hon Michael Mischin MLC (Chair)	Hon Donna Faragher MLC
Hon Sally Talbot MLC (Deputy Chair)	Hon Alison Xamon MLC
Hon Mia Davies MLC	

Staff as at the time of this inquiry:

Susan O'Brien, Advisory Officer (Legal)	Hannah Gough, Committee Clerk
Alex Hickman, Advisory Officer (Legal)	Mark Warner, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au

Website: <http://www.parliament.wa.gov.au>

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CONTENTS

1	REFERENCE AND INQUIRY PROCEDURE	1
	Referral	1
	Inquiry Procedure.....	1
	Scope of Report.....	3
2	THE BILL.....	3
	Overview of the Bill.....	3
	Key features of the intended regional subsidiary arrangement	5
	Practical effect of the Bill	7
3	CONTEXT FOR THE BILL - MODELS FOR LOCAL GOVERNMENT REGIONAL CO- OPERATION	10
	Introduction.....	10
	Western Australian models	10
	General	10
	Regional Local Governments	11
	Incorporated Association.....	12
	Voluntary Regional Organisations of Councils.....	12
	Regional collaborative groups.....	13
	Regional transitional groups.....	13
	Partnerships	14
	Local government enterprises.....	14
	Stakeholder comment on WA models	14
	Relationship between the Bill and current WA models	16
	The South Australian regional subsidiary model	16
	General	16
	Local Government Act 1999 (SA)	16
4	PRACTICAL EFFECT - ISSUES RAISED BY CLAUSE 8 OF THE BILL.....	18
	Introduction.....	18
	Minimalist Bill gives rise to uncertainty	18
	Broad areas of concern	18
	Framework for appropriate compliance regime uncertain	19
	Issues	19
	Practical effect may be different from stated intent	22
	Parliamentary review of regulations	23
	Ministerial approval and charter	26
	Provision of charter to Minister.....	26
	Publication of approval and charter.....	27
	Amendments to charter to be approved by Minister	27
	Likely approach to approval.....	28
	Uncertainty as to corporate status	28
	General	28
	Nature of corporate status that may be conferred not identified	29

Uncertainty as to “ <i>subsidiary</i> ” nature of a regional subsidiary	29
Responsibility for liabilities	30
Function	31
Whether single or multi-function regional subsidiaries are proposed and whether ‘function’ includes functions under other Acts	31
Whether regional subsidiary will undertake law-making function	32
Commercial enterprises	33
General	33
Distorting the market	34
Interest in other companies	34
Board membership.....	34
General.....	34
Proposal that board consist of non-Council members.....	35
Certain LGA powers can be exercised only by local government employees...36	
Protections offered to employees.....	36
5 ISSUES ARISING FROM OTHER CLAUSES OF THE BILL	38
Clause 5	38
Clause 7	38
6 CONCLUSION	39
Concluding Remarks	42

**APPENDIX 1 LIST OF SUBMISSIONS (INVITED AND RECEIVED) AND
WITNESSES AT HEARINGS.45**

APPENDIX 2 FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES51

**APPENDIX 3 LOCAL GOVERNMENT ACT 1995 (WESTERN AUSTRALIA):
REGIONAL LOCAL GOVERNMENTS.....55**

**APPENDIX 4 LOCAL GOVERNMENT ACT 1999 (SOUTH AUSTRALIA): REGIONAL
SUBSIDIARIES61**

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

LOCAL GOVERNMENT AMENDMENT (REGIONAL SUBSIDIARIES) BILL 2010

1 REFERENCE AND INQUIRY PROCEDURE

Referral

- 1.1 On 25 November 2010, Hon Max Trenorden MLC introduced the Local Government Amendment (Regional Subsidiaries) Bill 2011 (**Bill**), a Private Member's Bill, into the Legislative Council, when it was read for the first and second time.
- 1.2 The Bill was referred to the Standing Committee on Legislation (**Committee**) on 29 June 2011, initially for inquiry and report by 1 September 2011. On 1 September 2011, the Committee sought and was granted an extension of time to report to 29 September 2011.

Inquiry Procedure

- 1.3 The Committee advertised its inquiry in *The West Australian* newspaper on 6 July 2011 and sought public submissions in respect of the Bill. It also wrote to the stakeholders listed in **Appendix 1** seeking comment on particular matters and inviting submissions more generally. The Committee received 24 written submissions. These were from a broad range of stakeholders, including Hon Max Trenorden MLC, the Minister for Local Government (**Minister**), individual local governments, individual regional councils, peak local government and regional council bodies, and State and interstate government departments. (Submissions are listed in Appendix 1 and are available on the Committee's webpage <http://www.parliament.gov.au/LegislativeCouncil/Committees/LegislationCommittee>).
- 1.4 The Committee held two public hearings consisting of five sessions:
 - two sessions on 10 August 2011 - one with the Department of Local Government (**Department**) and one with Hon Max Trenorden MLC; and
 - three sessions on 17 August 2011 - one with the Western Australian Local Government Association (**WALGA**); one with the Forum of Regional Councils (**FORC**) and the Rivers Regional Council; and one with the South East Avon Voluntary Regional Organisation of Councils and the Shire of Cunderdin.

(A list of witnesses who appeared is included in Appendix 1. Transcripts of the Committee's hearings are available on its webpage <http://www.parliament.gov.au/LegislativeCouncil/Committees/LegislationCommitte.>)

1.5 Following the hearings, the Committee sought and received further:

- clarification from Hon Max Trenorden MLC of the purpose of the Bill; and
- information from the Department as to the likely practical effect of the Bill.

1.6 The Committee has also had regard to the following reports:

- Mr John Gilfellow, July 2007, *Options Paper on Variations to the Current Legislative Requirements on Regional Local Governments for Submission to the Minister for Local Government and Regional Development (Gilfellow Report)*;¹
- Local Government Advisory Board, 2006, *Local Government Structural and Electoral Reform in Western Australia - Ensuring the Future Sustainability of Communities (Local Government Advisory Board Report)*;
- Mr Neil Douglas, 2009, *Feasibility Study of Regional Collaborative Models for SEAVROC Local Governments (SEAVROC Report)*;²
- Hon Max Trenorden MLC and Hon Nigel Hallett MLC, 2009, *Structural Reform in South Australia and Queensland*;
- Local Government Reform Working Groups, 2010, *Report[s] to the Local Government Reform Steering Committee*;
- Local Government Reform Steering Committee, 2010, *Report*;
- Western Australian Local Government Association, Systemic Sustainability Study, *The Journey: Sustainability into the Future - Shaping the future of Local Government in Western Australia*, 2010 (**WALGA Report**); and

¹ As set out in the Shire of Brookton, Minutes for Ordinary Meeting of Council, 20 September 2007, pp46-54.

² In 2008, the Western Australian Local Government Association (**WALGA**), the South East Avon Voluntary Regional Organisation of Councils, Department of Local Government (**Department**) and the Western Australian Local Government Association jointly requested Mr Neil Douglas of law firm McLeods to undertake a feasibility study of regional collaborative models. (**SEAVROC Report**)

- Hon Max Trenorden MLC and Hon Nigel Hallett MLC, 2010, *An Alternative Path to Structural Reform of Local Government in Western Australia - A Means for Local Government in Western Australia to Ensure their Future is both Assured and Robust.*

1.7 The Committee thanks all persons and organisations making submissions and the witnesses attending the hearings for their assistance in its inquiry. It particularly wishes to thank WALGA for advertising the Committee's inquiry in its newsletter.

Scope of Report

1.8 Stakeholders raised a number of issues in the inquiry and expressed different views regarding:

- what matters should be dealt with in primary legislation and what in subsidiary legislation; and
- how the broad regulation-making powers should be exercised.

1.9 The Committee had regard to these views in the context of the Fundamental Legislative Scrutiny Principles generally considered by the legislation Committees of the House. These are set out at **Appendix 2**. (Particular attention is drawn to Fundamental Legislative Scrutiny Principles 3, 11, 12 and 13).

1.10 This report identifies what the Committee regards as the key issues and draws those issues to the attention of the House to assist it in its consideration of the Bill.

2 THE BILL

Overview of the Bill

2.1 In introducing the Bill, Hon Max Trenorden MLC advised that the Bill amends the *Local Government Act 1995 (LGA)* to:

enable local government to establish arrangements for sharing local government functions by formation of regional subsidiaries in a way that is consistent with the regional subsidiary model that is successfully operating in South Australia,

with a view to better performance of local government tasks.³

2.2 The central provision of the Bill is clause 8, which proposes section 3.69 be inserted into the LGA. Section 3.69(1) simply provides that two or more local governments

³ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 November 2010, pp9627-8.

making arrangements to perform a function jointly may, with the Minister's approval, form a subsidiary body (**regional subsidiary**) to perform that function. Subsection (2) lists matters on which regulations "may" be made. The balance of the Bill comprises formal title and date of operation provisions, and statements that regional subsidiaries are in addition to, and do not derogate from, other formal and informal co-operative arrangements between local governments.

2.3 Hon Max Trenorden MLC introduced the Bill in the context of the Government's policy for the structural reform of local government in Western Australia.⁴

2.4 One of the objectives of the Government's reform package is to ensure: "*Local governments explore membership of appropriate regional groupings*".⁵ Another objective of the reform is to deliver:

*legislative amendments to facilitate local government sustainability, including options for local governments to form corporate entities.*⁶

2.5 In his Second Reading Speech, Hon Max Trenorden MLC commented in respect of one aspect of the reform package that:

*Specifically, these strategies were announced to encourage local governments over a six month period to voluntarily amalgamate and form larger local governments,*⁷

He claimed that:

*Within many parts of rural WA the reform package was met with concern.*⁸

2.6 Some local governments look to the proposed regional subsidiary model as providing an alternative to amalgamation.⁹ However, the purpose of the Bill is more general. A number of local government sector reports across the major stakeholder groups (including the Local Government Advisory Board Report, the WALGA Report and the SEAVROC Report) recommend, and individual local governments call, for reform of the structures under which local governments may co-operate to provide services

⁴ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 November 2010, p9627.

⁵ Government of Western Australia, Department of Local Government, *Local Government Reform Steering Committee Report*, May 2010, p5.

⁶ Ibid, p5.

⁷ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 November 2010, p9627.

⁸ Ibid.

⁹ See Submission No 10 from Town of Cottesloe, 19 July 2011, p1, Submission No 15 from WALGA, July 2011, p7 and Submission No 17, Shire of Cunderdin, 20 July 2011, p3.

and undertake their functions. A regional subsidiary arrangement based on the South Australian model is a central element of this discussion.

- 2.7 Hon Robyn McSweeney MLC, representing the Minister, confirmed (in the Second Reading Debate) that, while the Government may amend the Bill on “*technical content*”, Hon Max Trenorden MLC’s proposal for regional subsidiaries was “*complementary to existing reform measures*”.¹⁰

Key features of the intended regional subsidiary arrangement

- 2.8 In the Second Reading Speech, Hon Max Trenorden MLC stated that the Bill is intended to:

- provide for “*good local governance*”;
- ensure that the power of a local government to act independently in a matter is not affected, with regional subsidiaries being “*subservient to the member council[s]*”;
- allow local governments to be members of more than one regional subsidiary;
- establish regional subsidiaries as bodies corporate; and
- require Ministerial approval for formation of a regional subsidiary, with the application for approval to be accompanied by a charter establishing the corporate status, powers and duties of the regional subsidiary.¹¹

- 2.9 The Committee notes that in his reply to the Second Reading Debate, Hon Max Trenorden MLC said:

*Proposed new section 3.69 will ensure that the Minister may not unreasonably withhold approval of an application.*¹²

There is, in fact, no such provision in the Bill. Hon Max Trenorden MLC advised, in his written submission, and confirmed in his evidence, that he did not now propose that the Bill contain such a clause, citing advice he had received from Parliamentary Counsel that it was unnecessary.¹³

¹⁰ Hon Robyn McSweeney, Minister for Child Protection, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2011, pp5125 and 5124.

¹¹ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 November 2010, pp9627-8.

¹² Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2011, p5125.

¹³ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p2.

2.10 In both his written and oral submissions Hon Max Trenorden MLC confirmed the statements in paragraph 2.8 reflect the policy of the Bill.¹⁴ Other witnesses also confirmed that paragraph 2.8 reflects their understanding of the intent of the Bill. In his evidence, however, Hon Max Trenorden MLC advises the Committee of additional important features of the framework for the regional subsidiary arrangement he envisages, including that:

- the charter be “*the regulatory source*” for regional subsidiaries, permitting a less prescriptive, more flexible governance;
- a copy of the charter of the regional subsidiary will be published in the *Government Gazette*;
- amendment of the charter is to be approved by the Minister (and that the Bill should contain a provision providing for this); and
- the regional subsidiary is intended to operate “*inside*” local government, not external to it. All the safeguards in the LGA (such as governance and prudential requirements, conflict of interest provisions and protection against liability) should apply to regional subsidiaries.¹⁵

Other additional features are identified in Part 4.

2.11 For Hon Max Trenorden MLC, application of LGA safeguards, powers and obligations to a regional subsidiary is inherent in the degree of subordination that he envisages in the regional subsidiary’s relationship with its “*parent councils*”.¹⁶

2.12 Hon Max Trenorden MLC advised (in his reply to the Second Reading Debate of the Bill) that “*well over half the local government associations in Western Australia*” have written to him supporting the Bill.¹⁷ The Committee confirms broad support in

¹⁴ Ibid and Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p1.

¹⁵ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p2 and Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, pp2, 3, 4, 8 and 15.

¹⁶ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p2. See, for example: “*This model is not about the new entity; it is about a function within councils ... a subsidiary council should draw its powers and its functions from the head council. That comes through the charter. ... This is an internal model versus an external one*” and “*Everything this model does, requires that for every act they do, they must report back to their head councils. They draw all their authority and all their power from the head authority. They do not draw from provisions of the current act or the South Australian Act or my amending bill. Everything that a council does is compliant with the councils that they form, so they cannot duck provisions; they cannot duck accountability.*” Hon Max Trenorden MLC, *Transcript of Evidence*, 10 August 2011, respectively pp 15 and 2.

¹⁷ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2011, p5125.

the submissions for the purpose in introducing the Bill as described in paragraphs 2.1 and 2.8.¹⁸

- 2.13 While there is broad support for the intent of the Bill, a number of the submissions do not make clear whether their support is for the Bill as drafted or for the South Australian regional subsidiary model. Many of the features Hon Max Trenorden MLC envisages being established by either regulations or a regional subsidiary's charter appear in the South Australian Act rather than in regulations or other subordinate instruments. (This is discussed in Part 4)

Practical effect of the Bill

- 2.14 The Committee observes that many of the submissions it received express uncertainty as to how the regional subsidiary arrangement proposed by the Bill will operate in practice. Some advise that they are unable to provide an opinion on the proposed arrangement until the regulations are made. Others submit that the Bill should be amended to provide a framework for the arrangement.¹⁹
- 2.15 Uncertainty ranges from the functions that may be undertaken by a regional subsidiary to the likely regulatory framework for them. For example:
- as to the former, the Shire of Williams sees one of the existing models as “*fine*” for a “*major function that is economically driven*”, with regional subsidiaries being used for simpler projects such as sharing staff;²⁰ whereas, the City of Perth considers the regional subsidiary model developed under the Bill should enable local governments to engage in “*entrepreneurial activities aimed at enhancing their financial viability*”;²¹ and
 - as to the latter, the Shire of Dardanup sees a dual compliance obligation arising from the LGA, stating: “*the Regional Subsidiary arrangement would not absolve a participating local government or the Regional Subsidiary from*

¹⁸ The Shire of Kulin, for example, advised that it “*fully supports the intent of the bill*” and observes that the Bill “*offers a genuine model that has been successful in South Australia*”. (Submission No 7 from Shire of Kulin, 19 July 2011, p1.) As seen in Part 3, however, the Bill as drafted does not replicate the South Australian model. The City of Mandurah advises it is “*broadly supportive*” of the model proposed by Hon Max Trenorden MLC, rather than stating it supports the Bill (Submission No 11 from City of Mandurah, 20 July 2011, p1.)

¹⁹ See for example, Submission No 12 from Mr Raymond Davey, Conway Davey Pty Ltd, 20 July 2011, pp2 and 3, Submission No 13 from the Shire of Kalamunda, 20 July 2011, p2 and Submission No 14 from the Western Metropolitan Regional Council 19 July 2011, pp1 and 2.

²⁰ Submission No 9 from Shire of Williams, 19 July 2011, p1.

²¹ Submission No 19 from City of Perth, 20 July 2011, p1. See also: Submission No 8 from the Pilbara Regional Council, 19 July 2011, p3 and the City of Mandurah, which saw the Bill as being directed at provision of a model for co-operative economic activity (it complains that the Bill requires Ministerial approval for each specific activity (Submission No 11 from City Of Mandurah, 20 July 2011, p1 and 9).

*compliance with the Local Government Act or any other legal obligation”;*²² whereas WALGA is of the view that the charter will be the “*primary governance and regulatory instrument*”, leading to a “*reduced compliance burden*”).²³

Other areas of uncertainty are set out in Part 4.

- 2.16 In part, the uncertainty flows from the Hon Max Trenorden MLC’s minimalist approach to drafting. The tenor of his evidence to the Committee is that the non-prescriptive style of the Bill is directed at allowing a regional subsidiary’s compliance obligations to be established in its charter and set at a level appropriate to the particular entity.
- 2.17 When the Department was asked at the hearing whether it considers that the Bill carries into effect the intended policy of the Bill as set out in the Second Reading Speech, the Department said:

*I think that fundamentally it does, in that the bill purports to establish a head of power within the act to allow two or more local governments to establish a regional subsidiary — an entity called a regional subsidiary — for the purpose of enabling them to perform functions jointly. So, at that fundamental level, the bill does provide that. We note that the bill then goes on to suggest that much of the detail in terms of how that entity might operate in regard to accountability and governance is to be set out in regulations. I guess you could say that the bill takes a pretty minimalist approach in terms of that head of power within the act, with the rest of the detail going into the regulations. I note that in, I think, both our ministerial submission and the departmental submission we did suggest that consideration be given to putting a bit more detail in the actual act itself rather than leaving it all to regulations, and in particular to perhaps differentiate between what is intended, what sits behind a regional subsidiary compared with some of the other options that are already available to local governments under the act, and in particular that of a regional local government. In that way it sort of balances it out and outlines some of the key features that are proposed with a regional subsidiary.*²⁴

²² Submission No 2 from Shire of Dardanup, 13 July 2011, p2.

²³ Submission No 15 from WALGA, July 2011, pp3 and 11. See also Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p1

²⁴ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p2.

- 2.18 However, the Bill is non-descriptive. Clause 3.69(2) of the Bill provides regulation-making powers that **may** (not **should**) be exercised, without providing guidance as to the manner in which they are to be exercised. The Minister observes that the Bill proposes that: “*all distinguishing aspects of a regional subsidiary are covered by regulation rather than in the body of the Act*”.²⁵
- 2.19 When questioned as to the regulatory compliance regime the Bill was likely to produce for regional subsidiaries, the Department advised that, while there was “*potential*” for a different compliance regime to those applying to current models to be established, it could not say whether that would be the case. The Department pointed out that the lack of detail in the Bill had the consequence that: “[*t*he level of detail is a policy decision that would go into the regulations.”²⁶ For example, the effect of the Department’s evidence is that the Bill may allow a more prescriptive arrangement than the South Australian model to be implemented.²⁷
- 2.20 As a result, the regulations could establish a regime that is not consistent with the intent of the Bill as described by Hon Max Trenorden MLC in his evidence to the Committee.
- 2.21 On the text of the Bill, Hon Max Trenorden MLC said:

*if you were to say to me that a bill written by Hon Max Trenorden is a superb piece of legislation, I would immediately disagree with that point of view! I would happily take clear advice on improvement.*²⁸

²⁵ Submission No 3 from the Minister for Local Government, 14 July 2011, p4.

²⁶ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p5.

²⁷ “*I guess the guidance we have been given is the arrangements that apply in South Australia. I guess that is what we would then be looking to if there was a government policy view to implement the South Australian model. The CHAIRMAN: But, by the same token, the legislation — the bill, I should say — does not necessarily limit you or guide you towards South Australia itself. The department can do something radically different. Given that there is only a reference—a desire—in the second reading speech to reflect that scheme, there is no requirement that you reflect that scheme. Mr Fowler: No. The bill very much leaves it to the government of the day to determine what the content would be. As Jenny mentioned, certainly in the Local Government Act at the moment, the general provisions about how local governments operate are contained in the act; similarly, in relation to regional governance, there are pages there that identify which parts of the Local Government Act apply and which do not, and issues of that sort. So I guess, conceivably, it would be possible for a future government to use this in a way that would give it some significant flexibility in how that might operate. The CHAIRMAN: And it could actually retain all the governance provisions in the Local Government Act that may restrict the flexibility that the member hopes to achieve by this bill. Mr Fowler: Absolutely. ...*” (Mr Tim Fowler, Special Advisor Legislation and Reform, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp3-4.

²⁸ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p3.

3 CONTEXT FOR THE BILL - MODELS FOR LOCAL GOVERNMENT REGIONAL CO-OPERATION

Introduction

- 3.1 To understand the uncertainty as to how the regional subsidiary arrangement will differ from current models,²⁹ and the different views as to the practical effect of the Bill, it is necessary to view the Bill in the context of the LGA, current co-operative models in Western Australia and the legislative framework for the South Australian regional subsidiary arrangement that inspired its introduction.
- 3.2 The LGA does not prohibit local governments from making arrangements to perform functions for each other or to jointly perform functions.³⁰ However, they cannot form, or have an interest in, a corporation unless establishing a regional local government or as permitted by regulations.³¹ Regulations currently permit local governments to form bodies corporate under the *Associations Incorporations Act 1987* and the *Strata Titles Act 1985*.³²

Western Australian models

General

- 3.3 There are a range of formal and informal models available to Western Australian local governments for the delivery of shared services and the achievement of common goals. These include:
- Regional Local Governments (**RLG**);
 - incorporated associations;
 - Voluntary Regional Organisations of Councils (**VROC**);
 - Regional Collaborative Groups (**RCG**);
 - Regional Transitional Groups (**RTG**); and
 - partnerships.

²⁹ See, for example: Submission No 2 from the Shire of Dardanup, 13 July 2011, p1 and Submission No 13 from the Shire of Kalamunda, 20 July 2011, p2.

³⁰ Other than in respect of law-making, Sections 3.68 and 3.6(2) of the *Local Government Act 1995*.

³¹ Sections 3.60 and 3.61 of the *Local Government Act 1995*.

³² Regulation 32 of the *Local Government (Functions and General) Regulations 1996*.

A Local Government Enterprise (**LGE**) model is currently under consideration.³³

3.4 Essentially, the Western Australian models can be categorised as those resulting in an entity that has a separate legal identity to the participating councils, and those which do not. The main advantages or disadvantages, depending on the stakeholder perspective, of:

- a separate legal identity - are that the entity can, in its own right, enter into legal relations (such as employment and holding property) and that governance and financial management obligations are ensured through direct application of relevant legislation (paragraph 3.2 identifies the types of separate legal entities available); and
- no separate legal identity - are that the entity is more clearly subordinate to those who create it and that formal legislative compliance is indirect, being through its participating councils.

Regional Local Governments

3.5 An RLG may be established by two or more local governments “*to do things*” for “*any purpose*” for which a local government can do things under the LGA or any other Act.³⁴ The particular purpose for which the RLG is established must be set out in its establishment agreement.³⁵

3.6 The LGA states that:

- an RLG is established as a “*body corporate*”;
- the LGA applies (with some exceptions) as if the RLG were a local government,

and confers power to make regulations excepting or modifying provisions of the LGA in their application to RLGs.³⁶

3.7 The declaration establishing the RLG must be published in the *Gazette* and the notice must state the date and purpose for which it is established.³⁷ The LGA also expressly requires an application for approval to establish an RLG to be accompanied by a copy of its establishment agreement and specifies matters the establishment agreement must

³³ Submission No 3 from the Minister for Local Government, 14 July 2011, *Appendix “Regional Local Government entities: Models for Regional Collaboration in Remote Areas: Discussion Paper - March 2011”* pp10ff.

³⁴ Section 3.61 of the *Local Government Act 1995*.

³⁵ Section 3.62(2) of the *Local Government Act 1995*.

³⁶ SEAVROC Report, p43.

³⁷ Section 3.61(4) of the *Local Government Act 1995*.

address (such as the means for determining the financial contributions of the participants and means of resolving disputes).

- 3.8 The LGA provisions in respect of an RLG are set out in **Appendix 3**.

Incorporated Association

- 3.9 The *Associations Incorporations Act 1987* permits five or more members to establish an incorporated association for the purposes set out in that Act.³⁸ These include establishing or carrying on a community, social or cultural centre, promoting the interests of a local community, political purposes and any other purpose approved by the Commissioner.³⁹ It is uncertain whether activities of a commercial nature, such as waste management and road construction, fall within the ambit of the *Associations Incorporations Act 1987*.⁴⁰ There are strict limitations on the distribution of any profit to members.⁴¹
- 3.10 Corporate bodies established under the *Associations Incorporations Act 1987* are subject to the regulatory compliance regime of that Act and relevant provisions of the *Corporations Act 2001* (Cwlth).⁴² This regime is less onerous than that imposed on RLGs under the LGA.⁴³ As they are not themselves local governments, LGA statutory powers and protections for members and employees (such as inspection powers and protection from liability) are not available to the board members and staff of these corporate bodies.⁴⁴

Voluntary Regional Organisations of Councils

- 3.11 VROC is a generic term for co-operative arrangements that are not founded in legislation. The SEAVROC Report describes one VROC arrangement as consisting

³⁸ Section 4(1) of the *Local Government Act 1995*. While the Department was of the view that less than five local governments could establish an association under this Act by nominating more than one individual board member each, WALGA provided a copy of its legal advice confirming that in the context of co-operation between local governments, “member” referred to the participating local governments. (Mr Tim Fowler, Special Advisor Legislation and Reform, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p9 and Email from Mr Tony Brown, Executive Manager Governance & Strategy, WALGA, 6 September 2011 attaching a letter from Civic Legal to WALGA dated 2 September 2011.)

³⁹ Section 4 of the *Associations Incorporation Act 1987*.

⁴⁰ SEAVROC Report, p38.

⁴¹ Section 4(2), (4) and (5) of the *Associations Incorporations Act 1987*. On this, see Mr John Gilfellon, July 2007, *Options Paper on Variations to the Current Legislative Requirements on Regional Local Governments for Submission to the Minister for Local Government and Regional Development*, p49 of the Minutes of the Shire of Brookton and the SEAVROC Report, pp38-9.

⁴² Section 3A of the *Associations Incorporation Act 1987*.

⁴³ See, for example, the SEAVROC Report: “*Compared with the Local Government act and Corporations Act, the reporting and accountability requirements imposed on an incorporated association are modest*” (p37).

⁴⁴ SEAVROC Report, p39.

of a Memorandum of Understanding, Strategic Plan and Proposed Charter of Operations.⁴⁵

- 3.12 Lack of a legal personality means a VROC cannot itself hold property or employ staff. Nor does a VROC have any of the obligations, powers or protections of the LGA. However, as no separate legal personality is interposed, a VROC may rely on the powers and protections available to, and the obligations imposed on, the participating local governments.

Regional collaborative groups

- 3.13 RCG is a model recently developed by the Department as part of the current local government reform package. It differs from VROCs more generally in being based on a Departmental model agreement and Departmental oversight of the process of entering into that agreement. The Department explains RCGs as being directed at performance of a wide range of functions and activities, including:

- corporate services such as records, rating, information technology, human resources and payroll;
- environmental health, natural resource management, building and development approvals; and
- local laws, planning schemes and integrated strategic planning.⁴⁶ (It is not clear whether it is proposed that RCGs have power to make subsidiary legislation or whether the participants will each make ‘uniform’ legislation - see section 3.6 of the LGA.)

- 3.14 RCGs are seen by the Department as appropriate for co-operative approaches to broad regional planning, rather than delivery of services or commercial activities.⁴⁷

Regional transitional groups

- 3.15 RTGs are another recent concept based on a model agreement developed by the Department.
- 3.16 RTGs differ from RCGs in that the model agreement is tailored to provide a transitional stage to amalgamation of the participating local governments.⁴⁸

⁴⁵ SEAVROC Report, p5.

⁴⁶ Government of Western Australia, Department of Local Government, *Regional Collaborative Group (RCG) Information Sheet*, pp1 and 2 (viewed on 10 July 2011).

⁴⁷ Government of Western Australia, Department of Local Government, *Regional Local Government Entities: Models for Regional Collaboration in Remote Areas Discussion Paper*, March 2011, p14.

⁴⁸ Government of Western Australia, Department of Local Government, *Regional Transition Group (RTG) Information Sheet*, p1 (viewed on 10 July 2011).

Partnerships

- 3.17 Local governments can also form formal partnerships with each other or other bodies (for example, private companies and other government agencies) for a range of purposes, such as to provide services or share employees.⁴⁹

Local government enterprises

- 3.18 Submissions to the Committee draw attention to a model currently under discussion, but not yet available to the local government sector. An LGE is described as an: “*arms-length, Local Government owned corporation*” that will provide: “*a range of Local Government services in a commercial and strategic way while separated from the Local Government’s everyday operations*”.⁵⁰
- 3.19 An LGE is a corporation with a non-elected board of directors, who may not be associated with the any of the controlling local governments, removing commercial decisions from the political realm. It is viewed by WALGA as being suitable for urban regeneration and commercial activities where “*low financial returns might be justified in pursuit of broader social objectives*”.⁵¹ Others, however, propose it for significant, profit-generating activities.⁵²

Stakeholder comment on WA models

- 3.20 While the Minister observes that RLGs have achieved “*demonstrable success*”, he advises that there has been criticism in the local government sector that they are too heavily regulated, particularly with regard to compliance requirements, and that they lack flexibility, particularly in relation to borrowings and investment. The Minister also identifies restriction of membership to elected members from participating local governments and accountability resting with the RLG, not the participating councils, as concerns.⁵³ The Local Government Advisory Board Report notes suggestions that:

*RLGs are viewed with suspicion, due in part to a loss of autonomy by member local governments and the ability of a RLG to impose its will on member local governments.*⁵⁴

⁴⁹ Submission No 3 from Hon G M Castrilli MLA, Minister for Local Government, 14 July 2011, Addendum, p6.

⁵⁰ Submission No 15 from WALGA, July 2011, p3.

⁵¹ Ibid, pp23-4.

⁵² See, for example, Submission No 11 from City of Mandurah, 20 July 2011, pp5-8 and 10 and Submission No 4 from City of Bunbury, 12 July 2011, p2.

⁵³ Submission No 3 from the Minister for Local Government, 14 July 2011, p1.

⁵⁴ Local Government Advisory Board, 2006, *Local Government Structural and Electoral Reform in Western Australia Ensuring the Future Sustainability of Communities*, p107.

3.21 These criticisms were present in many submissions made to the Committee. For example, WALGA stated:

*Consequently, most of the compliance and accountability requirements that apply to local governments also apply to regional local governments. This can become a significant disincentive for Local Governments to establish regional local governments because any potential benefits from efficiency gains must significantly outweigh the costs associated with the Regional Local Governments compliance obligations.*⁵⁵

3.22 The Shire of Cunderdin draws attention to the particular difficulties this poses for smaller rural local governments that wish to co-operate in delivery of “one-off” projects or services.⁵⁶

3.23 However, there are different views. The Shire of Dardanup was not alone in its view that the disincentive for forming an RLG lay in the difficulty in negotiating the establishment agreement, determining when to wind up (and the consequences of doing so), and the need for Ministerial approval of matters that local governments wished to control (such as amendment of the establishment agreement).⁵⁷

3.24 As a counterpoint to the criticisms of the formality required for RLGs, the Minister advises that VROCs have had uneven success due to their informal status (lack of legal personality) and lack of robustness.⁵⁸ This advice is illustrated by the SEAVROC Report. It identifies problems for the relevant VROC in its lack of a legal personality, its agreement documents being “largely silent” on proposed functions and activities and providing “little clarity” to a person trying to ascertain what SEAVROC is intended to do.⁵⁹

⁵⁵ Submission No 15 from WALGA, July 2011, p9. On compliance requirements, see also, Submission No 24 from Forum of Regional Councils, 16 August 2011, p2 and Submission No 8 from Pilbara Regional Council, 19 July 2011, p1.

⁵⁶ Submission No 17 from Shire of Cunderdin, 20 July 2011, pp1-2. See also Submission No 9 from Shire of Williams, 19 July 2011, p1.

⁵⁷ Submission No 2 from Shire of Dardanup, 13 July 2011, pp1-2. On Ministerial control see also, Submission No 4 from City of Bunbury, 12 July 2011, p2 and Submission No 6 from South West Group, 15 July 2011, p2. Interestingly, the South Australian Department of Planning and Local Government advises that: “Reportedly, the formality required around setting up a regional subsidiary and drawing up a charter is substantial and councils now more carefully weigh up their options prior to setting up a regional subsidiary”. (Submission No 22 from Department of Planning and Local Government, South Australia, 25 July 2011, p2.)

⁵⁸ Submission No 3 from the Minister for Local Government, 14 July 2011, p1.

⁵⁹ SEAVROC Report, pp5-6 and 9. See also Dominic Carbone, Executive Officer, South East Avon Volunteer Regional Organisation of Councils, *Transcript of Evidence*, 17 August 2011, p7.

- 3.25 In respect of these criticisms, the Committee observes that it is self-evident that any co-operative model depends on mutual goodwill and alignment of individual objectives.

Relationship between the Bill and current WA models

- 3.26 When asked at the hearing if it could identify any benefits or opportunities that the Bill would provide that were not currently available, the Department responded “*probably not*” in respect of the functions that a regional subsidiary might perform. In saying this, the Department further said that the regional subsidiary arrangement as outlined in the Bill could potentially offer more flexibility in the way in those functions could be performed and more accountability and reporting to participating councils. It also said that arrangement could potentially offer reduction in compliance requirements.⁶⁰
- 3.27 Hon Max Trenordan MLC agreed that there was no difference in the functions that could be performed under regional subsidiary model proposed by the Bill and those that could be performed under the current co-operative models. He advised the Committee that the Bill is directed at the view that some of the current models “*are cracking a walnut with a sledgehammer*”.⁶¹

The South Australian regional subsidiary model

General

- 3.28 South Australian local governments do not have the variety of co-operative models available in Western Australia. Instead, they may utilise a formal regional subsidiary model established under the *Local Government Act 1999 (SA) (SA Act)*.

Local Government Act 1999 (SA)

- 3.29 As noted above, Hon Max Trenorden MLC identified (in his Second Reading Speech) the South Australian regional subsidiary scheme as the primary model for the Bill. The relevant provisions of the SA Act are set out in **Appendix 4**.
- 3.30 At the hearing, Hon Max Trenorden MLC commented that the SA Act regional subsidiary model and the RLG model “*could not be further apart*”, characterising the LGA as “*very, very prescriptive*” and the SA Act as “*more open*”.⁶² The Minister, however, points to a series of specific governance requirements in the SA Act to illustrate that the SA Act ensures regional subsidiaries are closely directed and

⁶⁰ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp4-5.

⁶¹ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, pp11-12.

⁶² *Ibid*, p2.

supervised by their constituent councils.⁶³ The Shire of Kalamunda characterises the SA Act as “*very prescriptive*”, which it sees as a positive feature.⁶⁴

3.31 As can be seen from Appendix 4, the SA Act expressly:

- states that regional subsidiaries have body corporate status;
- requires the Minister to be provided with a copy of the proposed charter (which must deal with a number of specific matters such as constitution of the board, business plans, budget, reporting and liabilities) when applying for approval to establish a regional subsidiary;
- requires publication of approval to establish and that publication include a copy of the relevant charter;
- provides that the board of a subsidiary may consist of persons who are not members board of management of the constituent councils;
- states the circumstances under which an office of the board becomes vacant and otherwise regulates proceedings of the board;
- imposes duties of care, honesty and disclosure on board members;
- states that regional subsidiaries are to report to, and take direction from, their participating councils;
- states the matters business plans, budgets and audits must address and how frequently they are to be prepared;
- states that the liabilities of a regional subsidiary are guaranteed by the participating councils and requires the charter to deal with apportionment of liability between them;
- protects board members from civil liability; and
- sets the parameters for delegation of powers.

3.32 It can also be seen that section 274 of the SA Act currently empowers the South Australian Minister to undertake an investigation of regional subsidiaries and that:

- section 48 - prudential requirements,
- section 62 - general duties of board members; and

⁶³ Submission No 3 from the Minister for Local Government, 14 July 2011, p4.

⁶⁴ Submission No 13 from Shire of Kalamunda, 20 July 2011, p2.

- section 74 - conflicts of interest,

of that Act apply to regional subsidiaries.

4 PRACTICAL EFFECT - ISSUES RAISED BY CLAUSE 8 OF THE BILL

Introduction

Minimalist Bill gives rise to uncertainty

- 4.1 To ascertain the purpose of the Bill and provide the summary of the envisaged regional subsidiary arrangement in Part 2 of this report, the Committee had to have reference not only to the Second Reading Speech, but to the Second Reading Debate and information provided to this inquiry. Only one of the key features noted in Part 2 is suggested by the Bill.
- 4.2 While the Department stated the Bill “*fundamentally*” gave effect to the policy of the Bill as set out in the Second Reading Speech, it submitted that the Bill be amended to include a number of areas in the SA Act model “*so that on reading the act you at least get a sense of essentially what is being proposed, what are the core elements of this proposed entity within the act itself*”.⁶⁵
- 4.3 Uncertainty as to what is intended by the Bill is raised in local government submissions to the Committee. The Minister and Department also identify this as a problem, submitting that a more descriptive Bill would assist the Department in implementing the Bill should it be passed.⁶⁶
- 4.4 Given the above and as observed in Part 2, the non-descriptive nature of the Bill means that it is hard to be confident that the regulations will establish Hon Max Trenorden MLC’s intended model.

Broad areas of concern

- 4.5 The Committee has identified the following broad areas of concern and ambiguity in the practical effect of the Bill:
- Ministerial approval of a regional subsidiary’s charter;
 - the corporate status of a regional subsidiary;
 - the degree of subordination of a corporate regional subsidiary;

⁶⁵ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp2 and 10.

⁶⁶ Submission No 3 from the Minister for Local Government, 14 July 2011, pp3-4 and Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p15.

- use of the word “*function*” in proposed section 3.69(1);
- safeguards in the event of a regional subsidiary undertaking commercial activities;
- non-council membership of a regional subsidiary’s board and appropriate safeguards for that event;
- the powers, obligations and protections for a regional subsidiary’s employees and board members; and
- consequential amendment of other legislation.

Specific areas where guidance may be required for the Bill to have its intended effect are identified below to assist the House in its consideration of the Bill.

Framework for appropriate compliance regime uncertain

Issues

- 4.6 The Bill provides for any combination of LGA, regulations or charter to be utilised to establish the regional subsidiary compliance regime without indicating where the balance should lie or what matters are the responsibility of the regional subsidiary or its participating local governments.
- 4.7 Hon Max Trenorden MLC’s advice to the Committee that he intends a regional subsidiary to operate “*inside*” the current LGA provisions through its charter and subordination to its participating councils⁶⁷ is not apparent from the Bill. However, the Committee notes that application of LGA requirements depends on regulations. This suggests that the underlying intent may be that the LGA does not generally apply to regional subsidiaries. Illustrating this, the Western Metropolitan Regional Council welcomes the Bill’s apparent provision for an entity that “*is not governed by a Council under the [LGA], but might instead be governed by a Board*” and its potential for “*a genuine alternative to governance under the provisions of the LGA*”.⁶⁸

⁶⁷ On this Hon Max Trenordan MLC says: “*Understand that this model does not allow for a decision making process. They have to pass all that up to the head councils*” and “*The charter is very precise about what they are seeking to do but also — I know I keep on saying this — you need to come back to the point they are not a decision-making entity. They have still got to go back to the head councils to get approval of anything at all — in a serious matter; I should not say “anything at all”. In terms of raising money, reporting, fiduciary issues — all of those issues never leave control of the head councils*”. (Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, pp10 and 12.)

⁶⁸ WALGA also identifies one of the benefits of the regional subsidiary model as the entity’s accountability to its board, rather than the constituent local government’s councils. Submission No 15 from WALGA, July 2011, p13. Submissions expressing uncertainty as to the activities that may be undertaken by a regional subsidiary and when an RLG will instead be required also reflect lack of clarity in the Bill as to the proposed regional subsidiary arrangement. (See, for example, Submission No 2 from Shire of Dardanup, 13 July 2011, p2.)

4.8 The Shire of Dardanup also sees the proposal for primary compliance through charter obligations as permitting local governments to step outside the LGA. It submits:

*To have regulations that effectively allow a local government to step outside of the Local Government Act would create confusion and encourage opportunists to look for avenues to avoid scrutiny.*⁶⁹

While supporting an alternative governance mechanism to the LGA, the Western Metropolitan Regional Council observed that in drafting regulations, and possibly the Bill, consideration needs to be given to “[h]ow to avoid regional subsidiaries being created to remove projects from the scrutiny expected of local governments.”⁷⁰

4.9 There is no consensus in the local government sector as to the correct balance between the LGA, subsidiary legislation and the charter as the primary compliance document or the appropriate rigour of regulatory governance. For example:

- the Department and FORC favour a more prescriptive approach, preferring that a number of key features of a regional subsidiary be outlined in the Bill itself, including governance provisions.⁷¹ The Shire of Kalamunda also believed a more prescriptive approach was required, contrasting the Bill with the SA Act;⁷²
- the Shire of Cunderdin and Shire of Capel are of the view that the charter, in combination with regulations, should provide the compliance source, but seem to differ on which should be the primary location for governance;⁷³ and
- the City of Bunbury believes reliance on regulations and a charter, rather than a joint venture agreement and State government control of participating councils, is unnecessarily complicated and restrictive.⁷⁴

4.10 The differing views as to the purposes for which a regional subsidiary may be established influence views as to the appropriate compliance regime. Although not

⁶⁹ Submission No 2 from Shire of Dardanup, 13 July 2011, p2.

⁷⁰ Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p2.

⁷¹ See Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp2-3 and Alexander Sheridan, Chief Executive Officer, Rivers Regional Council, *Transcript of Evidence*, 17 August 2011, p3.

⁷² The Shire of Kalamunda submits: “*There is a reference to a charter in the proposed legislation for regional subsidiaries. ... If the Bill is enacted, regulation will need to be implemented for rules, conditions and powers established by charter. ... The legislation in South Australia ... is comprehensive.*” (Submission No 13 from Shire of Kalamunda, 20 July 2011, pp1-2)

⁷³ The Shire of Capel supports regulations that “*will prescribe provisions about the governance of management of regional subsidiaries; including the operation and financial planning, auditing and reporting to be undertaken by regional subsidiaries*”. (Submission No 1 from Shire of Capel, 12 July 2011, p2.)

⁷⁴ Submission No 4 from City of Bunbury, 12 July 2011, p2.

consistent, support in submissions for a compliance regime relying primarily on a combination of the charter and indirect regulatory compliance through participating councils is generally linked to non-metropolitan local governments envisaging that the model be used to deliver small scale services.⁷⁵ Concerns that such a model could lead to lack of scrutiny are generally linked to its use for commercial enterprises.⁷⁶

- 4.11 SEAVROC’s opinion that the charter should be the primary compliance instrument relies on its view as to the appropriate degree of subordination. It argues that a regional subsidiary’s reports will be referred to the participating councils for decision.⁷⁷ The degree of subordination it anticipates is illustrated by its contention that there is no need for a regional subsidiary to prepare an annual report for the Department pursuant to the LGA, as the participating councils already do so.⁷⁸
- 4.12 Similarly, Hon Max Trenorden MLC said that the proposed model involves no decision making on the part of the regional subsidiary. However, at one point he states that “*serious matters*” will have to be decided by the participating councils, suggesting that regional subsidiaries may make decisions on minor matters, and makes other statements calling into question the intended degree of indirect reporting through the participating councils - see paragraph 4.48 below.⁷⁹
- 4.13 Hon Max Trenorden MLC also intends that the Bill addresses a concern that “*a walnut [has been cracked] with a sledgehammer*” with respect to the administrative compliance obligations required by some other co-operative models. He anticipates

⁷⁵ See for example Submission No 23 from Shire of Merredin, 1 August 2011, p1. The South West Group said that the Bill: “*should not be seen as being able to satisfy the need for additional enterprise options*” and “*smaller regional subsidiaries should not require the approval of the Minister to be formed, make operational changes or to be wound up*”. (Submission No 6 from South West Group, 15 July 2011, p pp1 and 2) The Pilbara Regional Council submits that: “*The legislative setting governing regional subsidiaries should be light leaving most of the regulatory arrangements to individual charters*” but the compliance model for commercial activities should be “*robust but manageable*”. (Submission No 8 from Pilbara Regional Council, 19 July 2011, p3.)

⁷⁶ See, for example, Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, pp2 and 3. WALGA also says: “*Questions naturally arise about Local Government involvement in commercial activities given ratepayer funds are at stake. Common concerns involve issues of risk, Local Government capacity and competence and the conflicts associated with a Local Government occupying regulatory and ownership functions.*” WALGA proposes the LGE model for commercial activities as it provides “*the necessary separation between Local Government’s regulatory responsibilities and its imperatives as owner ... [and providing] greater accountability and transparency*”. (Submission No 15 from WALGA, July 2011, p24)

⁷⁷ “*And that is the difference and that is why I said right from the very beginning that the decision making in relation to any of that process and regulatory compliance will stay with each of the member councils. ... Yes, the processing side, Mr Chairman, would be done by SEAVROC, which is basically receiving the applications, doing all that background office work, prepare a report on behalf of the constituent council, will go before the council for a decision to be made. Once a decision is made, then it comes back to SEAVROC for on-processing. So the decision making always stays with the council where it originates.*” (Mr Dominic Carbone, Executive Officer, SEAVROC, *Transcript of Evidence*, 17 August 2011, p8.

⁷⁸ Ibid, pp5 and 3.

⁷⁹ “*Understand that this model does not allow for a decision making process. They have to pass all that up to the head councils. ... [they would have to go back on a] serious matter*”. (Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, pp10 and 12 - See also, pp5 and 9).

that regulations will be non-prescriptive, allowing the compliance obligations imposed in any particular charter to vary in accord with the function of the regional subsidiary.⁸⁰ (See SEAVROC's view that 'duplication' of annual reporting will be avoided.)

- 4.14 However, the degree to which a regional subsidiary reporting to its participating councils, rather than formally reporting to the Department, will necessarily reduce the compliance burden, or could do so without compromising the LGA governance expectations, is uncertain. Creation of a separate, corporate legal entity with a board of management and power to acquire and hold property (including money) and undertake services and commercial activities, implies some degree of autonomy and a need to prepare financial and annual reports.
- 4.15 The lack of independent decision-making contemplated by SEAVROC and Hon Max Trenorden MLC does not sit comfortably with the proposal that a regional subsidiary be a body corporate (that is, a separate legal personality). If the intent is that a regional subsidiary have some powers flowing from a separate corporate legal personality (for example, the ability to employ people and hold property) but be subordinate to the degree contemplated, that needs to be specified in the Bill (as the usual features attaching to an incorporated body will not produce the intended relationship between the two entities).

Practical effect may be different from stated intent

- 4.16 The Committee considers that the desire for more flexible, less prescriptive administrative regulation⁸¹ has to be balanced with the policy intent that the Bill ensure good local governance.
- 4.17 Relevant to the subsidiary relationship stated in the Bill and to the concerns expressed by the Shire of Dardanup and Western Metropolitan Regional Council, the Minister observes that reporting, direction and control provisions in the SA Act ensure that "*councils cannot avoid financial liability or political responsibility through the creation of a subsidiary*" and is of the view that the reporting mechanism for a regional subsidiary should be in the Bill.⁸² WALGA also observes that while there may be concerns that relatively light regulation of regional subsidiaries entails an

⁸⁰ Ibid, pp11-2 and p5. See also, Submission No 15 from WALGA, p13: "*It is a key feature of the regional subsidiary model that there is flexibility regarding the governance structure depending on the purpose and function of each particular regional subsidiary*".

⁸¹ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p12.

⁸² Submission No 3 from the Minister for Local Government, 14 July 2011, p2.

“*unacceptable degree of risk*”, there are “*significant regulatory requirements*” placed on regional subsidiaries in the SA Act.⁸³

- 4.18 The Department’s view is that it would be “*advisable*” for regulations to address key accountability, governance and transparency issues.⁸⁴ The Department also suggests that consideration be given to whether some of the SA Act compliance and governance provisions should be in the Bill.⁸⁵
- 4.19 Because the Bill is silent on this issue, there is no certainty as to how prescriptive any regulations may be. As noted in Part 2, the Department considers the Bill leaves it open for regulations to take a more prescriptive approach than intended by Hon Max Trenorden MLC.⁸⁶ It also points out that the Bill “*very much*” leaves the potential for “*flexibility*” in the compliance regime to the policy decision made when balancing flexibility in operation with proper accountability.⁸⁷
- 4.20 There is, therefore, no certainty as to the balance that will be struck between direct application of LGA compliance provisions to a regional subsidiary, imposition of compliance obligations through current or new regulation and establishing the compliance obligations through the charter and reliance on obligations imposed on its participating councils.
- 4.21 Hon Max Trenorden MLC’s statements of intent do not address the fact that there may be two or three paths that subsidiary legislation could take. Any one of these paths will leave some stakeholders dissatisfied.

Parliamentary review of regulations

- 4.22 The City of Bunbury, in advising that it could not make a decision on how effective regional subsidiaries might be until “*the type of regulations are identified and drafted*”, submitted that the Joint Standing Committee on Delegated Legislation

⁸³ Submission No 15 from WALGA, July 2011, p11. (At the hearing, WALGA expressed a general preference for the non-descriptive nature of the Bill - Mr Tony Brown, Executive Manager Governance and Strategy, WALGA, *Transcript of Evidence*, 17 August 2011, pp4-5).

⁸⁴ Response to additional questions from Ms Jennifer Mathews, Director General, Department of Local Government, 29 August 2011, p2.

⁸⁵ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p2.

⁸⁶ Mr Tim Fowler, Special Advisor Legislation and Reform and Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp3-4.

⁸⁷ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p5. See also, Mr Tim Fowler, Special Advisor, Legislation and Reform and Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, pp 4 and 10.

“needs to conduct a similar review to [the Committee’s] when the Regulations or Charter are tabled”.⁸⁸

4.23 The Committee draws the following matters to the attention of the House:

- the Bill does not require tabling of any charter or a model charter;
- the Joint Standing Committee on Delegated Legislation terms of reference require it to consider whether subsidiary legislation is “*authorised or contemplated*”. The non-descriptive nature of the Bill authorises regulations on certain matters (and generally) without providing guidance as to how those powers should be exercised. It does not require regulations to be made on any particular matter; and
- proposed section 3.69(2) authorises regulations that “*regulate*” or “*provide for*” a matter. It does not require matters to be “*prescribed*”. There is, therefore, uncertainty as to whether the substance of an obligation will be in the text of regulations or the regulations will “*provide for*” a matter to be dealt with administratively in documents not subject to Parliamentary scrutiny, such as guidelines. (See paragraphs 4.37 and 4.38 below.)

4.24 Relevant to these issues, the Minister submitted that if it is intended that “*all essential matters be dealt with by regulation*”, proposed section 3.69(2) requires expansion to “*foreground*” additional important points for the regulations to address. The Minister provided the following examples:

- when and how an approved subsidiary comes into existence, and where the charter and approval are to be published;
- how often constituent councils must review the charter of a regional subsidiary;
- the procedure for advising the Minister of any amendment and how any such amendment will be published;
- the words 'including provisions relating to membership of a board of management of a regional subsidiary' be added at the end of proposed section 3.69(2)(d);
- provisions about liabilities incurred or assumed by a regional subsidiary;
- provisions about protection from liability for board members of subsidiaries;

⁸⁸ Submission No 4 from City of Bunbury, 12 July 2011, p2.

- provisions about what, if any, interest a regional subsidiary may hold in a company. (Section 3.60 of the LGA restricts the interests a local government and RLG may hold. See discussion on clause 5 in Part 5 below);
- provisions about a subsidiary's power of delegation; and
- provisions addressing potential conflicts of interest by Board members who are also councillors, and with disclosure by board members of subsidiaries. (The Minister referred to the SA Act provisions).

4.25 In addition, the Minister advised that detailed regulations will need to be developed “to *expand the intent* of Section 3.69[2](d) and (e) ... to ensure the [below] safeguards are provided to member councils and the community”.⁸⁹ (Committee’s emphasis). The identified matters are:

- whether a regional subsidiary is intended to be partially or fully self-funding, and other relevant arrangements relating to costs and funding;
- any special accounting, internal auditing or financial systems or practices to be established or observed by a regional subsidiary;
- the acquisition and disposal of assets;
- the manner in which a regional subsidiary deals with surplus revenue;
- the nature and scope of any investment which may be undertaken by a regional subsidiary; and
- a regional subsidiary's obligations to report on its operation, financial position and other relevant issues.

4.26 The issue here is whether the Bill is sufficiently **descriptive**, as distinct from prescriptive.

⁸⁹ Submission No 3 from the Minister for Local Government, 14 July 2011, p5.

4.27 This is important as any regulations that “*expand the intent*” of primary legislation are at risk of being found invalid by a court.⁹⁰

Ministerial approval and charter

Provision of charter to Minister

4.28 As previously noted, Hon Max Trenorden MLC’s intent is that the charter be the primary compliance document in the proposed regional subsidiary mode. He said: “*I would argue that the charter is more important than the regulations.*”⁹¹ Hon Max Trenorden MLC also relies on Ministerial approval of a charter to meet accountability concerns, observing that the Minister will ensure that a charter meets all the requirements of the LGA.⁹²

4.29 However, as drafted, the Bill does not require the Minister to approve a charter or to ensure that the charter meets any requirements of the LGA. Whether or not an application for approval to establish a regional subsidiary is to be accompanied by a charter will be decided by regulations. (The discretion in these matters, see clause 8, proposed section 3.69(2)(b), can be contrasted with the equivalent SA Act provisions and the LGA provisions for RLGs, which respectively state that the proposed charter or establishment agreement is to be provided when applying for Ministerial approval.)⁹³

4.30 In his written submission, Hon Max Trenorden MLC acknowledged legal uncertainty as to the Bill’s intent in respect of preparation and provision of a charter. He advised that if the Committee considered that insertion of wording similar to section 3.61(2)(b) of the LGA would result in greater certainty, he would support that approach.⁹⁴

⁹⁰ *Shanahan v Scott* (1957) 96 CLR 245, p250. *Shanahan v Scott* is a High Court case in which the Court said where there is a power to make regulations “*necessary or convenient*” for giving effect to an Act: “*...such a power does not enable the authority by regulations to extend the scope or general operation of an enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying out or to depart from or vary the plan which the legislature has adopted to attain its ends.*” The submission from the South Australian Department of Planning and Local Government drew attention to this case in responding to the question as to whether the prescriptive nature of the SA Act gave rise to difficulties. It said at footnote 1: “*The High Court in the case of Shanahan v Scott adopted a narrow interpretation of the words ‘necessary or expedient’ meaning the words cannot be interpreted as intending to widen the scope of a power.*” (Submission No 22, p3)

⁹¹ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p12.

⁹² *Ibid*, p3

⁹³ Clause 17(2)(c) of Schedule 2 of the *Local Government Act 1999* (SA) and Section 3.61(2)(b) of the *Local Government Act 1995* (Jurisdiction if not WA).

⁹⁴ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011.

- 4.31 The Committee considers insertion of wording similar to section 3.61(2)(a) of the LGA into the Bill will provide certainty for this central feature of the proposed regional subsidiary arrangement.

Publication of approval and charter

- 4.32 The Minister considers that the Bill should make provision for regulation on “*key points*”, including when and how a regional subsidiary comes into existence and where the charter and approval are to be published.⁹⁵ (The SA Act, and LGA provisions in respect of an RLG state these matters.)
- 4.33 Hon Max Trenorden MLC advises it was not his intent when proposing the Bill but that he “*strongly support[s]*” a provision like that in the SA Act requiring publication of a regional subsidiary’s charter in the *Government Gazette*.⁹⁶

Amendments to charter to be approved by Minister

- 4.34 The Bill makes no provision for review and amendment of a charter or for amendments to be submitted for Ministerial approval. As seen in paragraph 4.35, some stakeholders submit that these matters should be dealt with in legislation, rather than simply in the charter.
- 4.35 However, there are differing views as to the appropriate provision. As reported in Part 2, Hon Max Trenorden MLC’s view is that the Bill should contain a provision for amendment of the charter to be approved by the Minister. The Minister’s view is that the Bill should be amended to require regulations addressing review and amendment of a charter. WALGA supports the SA Act requirement that the charter be reviewed every four years and if amended submitted to the Minister for approval.⁹⁷ The South West Group considers small regional subsidiaries should not be required to refer changes to its charter, membership of the Board or stakeholder councils to the Minister.⁹⁸
- 4.36 Given the importance of the charter to the proposed arrangement, and that Hon Max Trenorden MLC does not see imposition of requirements in the Bill as contrary to the policy intent, the Committee considers that the Bill should stipulate these matters.

⁹⁵ Submission No 3 from the Minister for Local Government, 14 July 2011, p3.

⁹⁶ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p14.

⁹⁷ Submission No 15 from WALGA, July 2011, p21.

⁹⁸ Submission No 6 from South West Group, 15 July 2011, p2.

Likely approach to approval

4.37 The Minister advises that the requirement for Ministerial approval for the establishment of a regional subsidiary will ensure that regional subsidiaries are not established:

- where amalgamation would be more appropriate;
- unless the constituent councils are able to demonstrate sufficient governance, capacity and management of risks; or
- in the absence of community consultation.

The Minister advises that these criteria may be established in regulations or administrative guidelines.⁹⁹

4.38 The Committee's view is that regulations should provide criteria for Ministerial approval for the establishment of a regional subsidiary.

Uncertainty as to corporate status

General

4.39 There is no requirement in the Bill that a corporate status be conferred. Regulations may provide for a "*corporate status*".¹⁰⁰ When the Bill is read in the context of the LGA, there is no certainty that a corporate status is required (contrast section 3.62(1)(a) of the LGA, which expressly states an RLG is a body corporate.)

4.40 The Minister submits that the Bill should make it clear that the regional subsidiary is a body corporate.¹⁰¹ Hon Max Trenorden MLC advises that it is his intent that regional subsidiaries be bodies corporate.¹⁰²

4.41 Conferral of a corporate status on regional subsidiaries is a key feature of the proposed arrangement. For the Bill to have its intended practical effect, this should be clearly stated in the Bill. This is particularly the case in the circumstance that guidance is required as to the consequences that flow from the corporate status.

⁹⁹ Submission No 3 from the Minister for Local Government, 14 July 2011, p2.

¹⁰⁰ Clause 8, proposed section 3.69(2)(c) of the Bill.

¹⁰¹ Submission No 3 from the Minister for Local Government, 14 July 2011, p2.

¹⁰² Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p1.

Nature of corporate status that may be conferred not identified

- 4.42 In the event corporate status is conferred, there is no certainty as to the corporate model that will be applied. The Department advises that the body corporate option, with governance under the LGA, is its understanding of the intended model.¹⁰³
- 4.43 However, as noted above, some stakeholders contend that a regional subsidiary will operate in a manner similar to a committee of the participating councils, without explaining how the regional subsidiary may resolve any different instructions from those councils. Others contend that it will be an ‘independent’ body, as to what this means is not clear to the Committee. This is discussed further below.
- 4.44 Also, some stakeholders questioned whether the *Corporations Act 2001* (Cwlth) would apply to regional subsidiaries.¹⁰⁴ In part, this relates to a lack of distinction in the Bill between the regional subsidiary and the LGE model.¹⁰⁵ The Department is of the view that the Bill, as drafted, does not require a model that will allow commercial enterprises and whether that will eventuate will depend on application of LGA provisions by regulation (see paragraph 4.67 below).
- 4.45 Some submissions expressed concern that use of a regional subsidiary model for commercial enterprises will avoid the scrutiny required by the *Corporations Act 2001* (Cwlth). If the regional subsidiary model is developed to encompass commercial enterprises, incorporation under the *Corporations Act 2001* (Cwlth) may be the preferred option. If that is the case, there will be a more complex compliance burden.

Uncertainty as to “*subsidiary*” nature of a regional subsidiary

- 4.46 As noted above, the “*subsidiary*” nature of the regional subsidiary is not clear from the Bill. Under the Bill, the remit of a regional subsidiary is the same as that of the member local governments - their powers are also expressed as performing a function. There is no mechanism in the Bill for oversight of regional subsidiaries by the member local governments.
- 4.47 The Shire of Cunderdin states that under the regional subsidiary model, the member councils jointly control the entity and can direct its business.¹⁰⁶ The Western Metropolitan Regional Council, however, sees a regional subsidiary as reporting to its board, rather than “*upwards*” to its member councils. It submits that consideration needs to be given to whether the participating local governments will have “*any form*

¹⁰³ Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p11.

¹⁰⁴ See for example Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p2.

¹⁰⁵ See Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p11, where the distinction between a body corporate under the *Local Government Act 1995* and the LGE model of incorporation under the *Corporation Act 2001* (Cwlth) is made.

¹⁰⁶ Submission No 17 from Shire of Cunderdin, 20 July 2011, p2.

of control” over the activities of the regional subsidiary once the charter has been approved.¹⁰⁷ The Shire of Dardanup submits that the regulations should set out the intended relationship¹⁰⁸ (that is, whether the regional subsidiary functions as a joint committee of the participating councils, as anticipated by the Shire of Cunderdin, or is more akin to an RLG, as preferred by the Western Metropolitan Regional Council).

4.48 The intended degree of subordination is also not clear in the evidence provided to the Committee. For example, Hon Max Trenorden MLC assumes a regional subsidiary’s corporate plan will be provided to the Minister, not the participating councils, for approval: *“The minister has the capacity to consider all the issues relating to what is put forward to the minister in a corporate plan - an analysis included”*.¹⁰⁹ He also expects that regulations will apply some provisions of the LGA to regional subsidiaries.¹¹⁰

4.49 The Minister advises that:

it is understood that it is intended that regulations would provide that a Regional Subsidiary would be closely directed and supervised by, and would be accountable to, its constituent councils, which would be ultimately responsible for its activities,

but considers that the reporting mechanism back to the constituent councils should be made clear in the Bill.¹¹¹

4.50 Where primary legislation confers equal powers on entities, the ways in which one is accountable to the other should be outlined in the primary legislation. This is the position under the SA Act (see Appendix 4).

Responsibility for liabilities

4.51 Some submissions raised responsibility for liabilities incurred by a regional subsidiary as an area of uncertainty. The Western Metropolitan Regional Council, for example, queries whether the local governments creating the regional subsidiary are ultimately responsible for its liabilities or whether a regional subsidiary is to be structured on the limited liability basis of a corporation.¹¹² The Shire of Dardanup queries how

¹⁰⁷ Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p2.

¹⁰⁸ Submission No 2 from Shire of Dardanup, 13 July 2011, p3.

¹⁰⁹ Hon Max Trenorden MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 29 June 2011, p5125.

¹¹⁰ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p2.

¹¹¹ Submission No 3 from the Minister for Local Government, 14 July 2011, pp1 and 4.

¹¹² Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p2.

responsibility for damage to the environment under contaminated sites legislation can be distributed amongst participating councils.¹¹³

- 4.52 Hon Max Trenorden MLC advises that it is his intent that regional subsidiaries will operate within the liability provisions of the LGA.¹¹⁴ There are different views as to how this may be achieved.
- 4.53 WALGA believes that regulations should require the extent of liability of participating councils on winding up of the regional subsidiary to be dealt with in the charter.¹¹⁵ While the proportion of liability to be borne by a particular participating council may be considered a matter that can be dealt with in the charter, some submissions raise the question of whether, given the interposition of a separate legal entity, any liability will be imposed.
- 4.54 The Minister is of the view that the Bill requires amending to address liabilities incurred by a regional subsidiary (and protection for its board members and employees).¹¹⁶

Function

Whether single or multi-function regional subsidiaries are proposed and whether ‘function’ includes functions under other Acts

- 4.55 The City of Mandurah understands use of the singular “*function*” in proposed section 3.69(1) limits regional subsidiaries to performance of a single function only.¹¹⁷
- 4.56 The *Interpretation Act 1984* provides generally that the singular includes the plural and *vice versa*.¹¹⁸ However, this general provision is subject to the terms of particular legislation. The LGA uses the words “*function*” and “*functions*” specifically when differentiating between single and multiple functions. It is, therefore, arguable that, as drafted, proposed section 3.69(1) is not intended to capture “*functions*”, but is limited to a “*function*”.
- 4.57 Hon Max Trenorden MLC advised (in his response to the Committee’s written questions) that he did not intend to limit a regional subsidiary to a single purpose.¹¹⁹

¹¹³ Submission No 2 from Shire of Dardanup, 13 July 2011, p1.

¹¹⁴ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p2 and p4.

¹¹⁵ Submission No 15 from WALGA, July 2011, p28.

¹¹⁶ Submission No 3 from the Minister for Local Government, 14 July 2011, p3.

¹¹⁷ See Submission No 11 from City of Mandurah, 20 July 2011, p1.

¹¹⁸ Section 10(c) of the *Interpretation Act 1984*.

¹¹⁹ Letter from Hon Max Trenorden MLC, Legislative Council, 26 August 2011, p2.

- 4.58 It is also not clear whether the “*function*” referred to in proposed section 3.69(1) captures not only a function under the LGA but other Acts. (Local governments have a number of specific functions conferred by other Acts, such as the *Planning and Development Act 2005* and the *Waste Avoidance and Resource Recovery Act 2007*.)
- 4.59 One possible interpretation is that the word “*function*” in proposed section 3.69(1) refers to the “*general function*” conferred on local governments by the LGA. By section 3.1(2) of the LGA this relates to functions conferred by other written laws.
- 4.60 However, whenever the LGA refers to the “*general function*” it uses that specific term. Also, whenever it speaks of a function, and wishes to include a function conferred by other Acts, it specifically says so. For example, section 3.61 states that an RLG may be established: “*for any purpose for which a local government can do things under this Act or any other Act*”. Proposed section 3.69(1) may be contrasted with section 3.61 of the LGA to conclude that regional subsidiaries may only be established to perform a function under the LGA.¹²⁰
- 4.61 In his written submission, Hon Max Trenorden MLC advised:

*It was always my intention that a regional subsidiary would be able to undertake functions conferred by other Acts, particularly with respect to planning and health matters. I think that the inclusion of some additional words under proposed section 3.69(1) to extend the scope of the functions to include “under this Act or any other Act” would enable this to be simply achieved.*¹²¹

- 4.62 Amendment of clause 8 of the Bill so that proposed section 3.69(1) uses the word “*functions*” and includes a reference to functions under other Acts will ensure that the Bill has its intended practical effect.

Whether regional subsidiary will undertake law-making function

- 4.63 As noted in Part 2, the Bill proposes that a regional subsidiary undertake any function that may be undertaken by a local government. The question arises as to whether regional subsidiaries may be authorised to perform law-making functions (by amended application of section 3.6 of the LGA). The Bill does not prohibit this occurring.
- 4.64 The Department observes that section 43(2) of the SA Act precludes a South Australian regional subsidiary from performing both a regulatory activity and a

¹²⁰ One officer of the Department took this approach at hearing (Mr Tim Fowler, Special Advisor Legislation and Reform, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p14).

¹²¹ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p2. See also Tim Fowler, Special Advisor, Legislation and Reform, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p9.

significant and related service activity. However, it does not propose this separation for Western Australia.¹²² (See, however, WALGA's view on the need for this separation for commercial activities at footnote 76.)

Commercial enterprises

General

4.65 Hon Max Trenorden MLC informed the Committee that one of the reasons the local government sector supports the Bill is that it provides a model that may permit local governments to co-operate in profit-making activities.¹²³

4.66 A particular question that arose in submissions is whether - and the extent to which - a regional subsidiary could be used to undertake commercial enterprises. That there are different views as to the appropriateness of this occurring, and the regulatory regime such an undertaking would require, has been noted in paragraphs 2.15, 4.9 and 4.10.

4.67 The Bill does not require regulations to establish a regional subsidiary model that permits those entities to engage in commercial enterprises. Whether this will occur is uncertain:

- in observing that this depends on the extent to which the regulations apply the sections of the LGA regulating profit-making activities to regional subsidiaries, the Department expressed no view on whether the necessary provisions will be applied;¹²⁴ and
- some submissions suggest the local government sector is uncomfortable with regional subsidiaries engaging in commercial enterprises. As previously reported, the Western Metropolitan Regional Council said: "*The Bill should guard against subsidiaries being created to subvert requirements on corporations (potentially driven by the private sector)*".¹²⁵ Other submissions suggest the degree of subordination described by the Shire of Cunderdin is not consistent with commercial undertakings. The City of Mandurah, for example, submits that separation of the regional subsidiary from the participating councils (as proposed by the LGE model) will avoid potential conflicts of interest in local government's commercial involvement in the property sector.¹²⁶

¹²² Submission No 16 from Department of Local Government, 26 July 2011, p5.

¹²³ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p15.

¹²⁴ Letter from Department of Local Government, 29 August 2011, p1.

¹²⁵ Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p3.

¹²⁶ Submission No 11 from City of Mandurah, 20 July 2011, p7.

Distorting the market

- 4.68 The Western Metropolitan Regional Council observed that there are competition policy implications in commercial activities undertaken by local governments. It suggested that the Bill should provide a mechanism preventing regional subsidiaries being used to distort the market for private sector providers of similar services.¹²⁷ The Department suggested that regulations should require the charter to specify the extent to which the principles of competitive neutrality are to be applied.¹²⁸
- 4.69 The Shire of Cunderdin sees this issue as being of little relevance to non-metropolitan local governments. It considers that profit-making services will only be provided in the circumstance that there is no other provider in the market and is of the view that there is accountability to the community for unfair competition in the election process for a regional subsidiary's participating councils.¹²⁹

Interest in other companies

- 4.70 Related to these matters, the Minister and the Western Metropolitan Regional Council submitted that it is necessary for the Bill to deal with what interest, if any, a regional subsidiary may hold in other corporations.¹³⁰

Board membership

General

- 4.71 The Local Government Advisory Board Report did not support election of members to an RLG, due to potential for conflict between the RLG's interests and the interests of the participating councils. Regardless of how they are appointed, the potential for a conflict of interest between the participating councils and a regional subsidiary's board needs to be born in mind.¹³¹ This reflects the tension between the views that a regional subsidiary will operate in a manner similar to a local government committee and the view that it is intended to be an independent entity.

¹²⁷ Submission No 14 from Western Metropolitan Regional Council, 14 July 2011, p2. The City of Bunbury proposed a number of activities that it wished to undertake under the LGE model that suggested competition with private and other public sectors (Submission No 11 from City of Bunbury, 20 July 2011, p9). The City of Perth submitted that regulations made under the Bill should "*be framed in a way that enables local governments to engage in entrepreneurial activities aimed at enhancing their financial viability*". (Submission No 19 from City of Perth, 20 July 2011, p1)

¹²⁸ Submission No 16 from Department of Local Government, 20 July 2010, p1.

¹²⁹ Mr Graham Cooper, Councillor, Shire of Cunderdin and Chairperson South East Avon Voluntary Organisation of Councils, *Transcript of Evidence*, 17 August 2011, p9.

¹³⁰ Submissions No 3 from the Minister for Local Government, 14 July 2011, p3 and No 14 Western Metropolitan Regional Council, 19 July 2011, p2

¹³¹ Submission No 3 from the Minister for Local Government, 14 July 2011, p3 and Submission No 16 from Department of Local Government, 20 July 2011, p2.

- 4.72 This issue has been raised in submissions.¹³² The Minister submits that the Bill should be amended to deal with conflicts of interest and disclosure requirements in respect of a regional subsidiary's board (see paragraph 4.24 above).

Proposal that board consist of non-Council members

- 4.73 The Bill is silent on non-council membership of regional subsidiary boards.
- 4.74 As noted in Part 3, one identified criticism of RLGs is that the board members are all elected members of the participating councils. Some submissions welcome the prospect of non-elected members for a regional subsidiary's board. This is seen, particularly in undertaking commercial activities, as allowing for relevant expertise.¹³³ The Shire of Dardanup goes further than most. It submits that if a regional subsidiary is limited to a particular activity there should be no elected members on the board, which should comprise chief executive officers of the participating councils.¹³⁴
- 4.75 The Minister's view is that the Bill: "*restricts membership of the entity itself to constituent councils only, with no provision for membership of the entity by non-council organisation, such as commercial enterprises*". The Minister advises that for non-council membership to occur a new head of power might be required in the LGA.¹³⁵
- 4.76 During the hearing, the Hon Max Trenorden MLC explained to the Committee that it was his intent that there be an option for non-Council members to be on the board of a regional subsidiary.
- 4.77 The Department submits that in the event of non-council board membership, the SA Act provisions in respect of duties of honesty and care are required as external board members might not otherwise be subject to the integrity provisions of the LGA.¹³⁶

¹³² Submission No 16 from Department of Local Government, 20 July 2010, p2. See also Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p2: "*Regional Councillors can confuse their role on a Regional Council, believing that they are representing their local government when, in fact, their role is more akin to a director of the Regional Council.*"

¹³³ See, for example, Submission No 15 from WALGA, July 2011, p12.

¹³⁴ Submission No 2 from Shire of Dardanup, 13 July 2011, p3. The City of Bunbury, however, cautions that if a regional subsidiary were to have power to act through employed executive staff that would "*have its own complications*". (Submission No 4 from City of Bunbury, 12 July 2011, p2.)

¹³⁵ Submission No 3 from the Minister for Local Government, 14 July 2011, pp2 and 3.

¹³⁶ Submission No 16 from Department of Local Government, 20 July 2011, p2.

Powers, obligations and protections for employees and board members

Certain LGA powers can be exercised only by local government employees

- 4.78 The SEAVROC report recommends that in implementing a regional subsidiary model, attention be given to the “critical” distinction between “a local government employee” and the powers that may be given to “any person” under the LGA. It observes that if the regional subsidiary model is adopted, amendments to the LGA are necessary to ensure that powers that can only be given to a local government employee can be given to the regional subsidiary’s employee.¹³⁷ This relates to powers such as investigation, entry onto property and commencing prosecutions.
- 4.79 Hon Max Trenorden MLC advises that he does not contemplate regional subsidiaries conducting prosecutions. However, it appears that other powers may be required.¹³⁸

Protections offered to employees

- 4.80 Submissions to the Committee identified extension of the LGA protection from liability provisions to regional subsidiaries and their employees as necessary. As with employee powers, the SEAVROC Report notes that the LGA will require amendment to extend protections for employees and members of local governments to the new corporate body.¹³⁹
- 4.81 Hon Max Trenorden MLC advises the Committee that he expects the regulation-making power to be used to apply the relevant LGA provisions.
- 4.82 However, it is not clear that proposed section 3.69(2)(g), in authorising regulations to apply a specified LGA provision with “modifications” is wide enough to encompass all of the amendments required to the LGA. Extension of local government powers and protections to entities that are not themselves local governments may be seen as altering the scope of the LGA itself. Proposed section 3.69(2) is akin to a Henry VIII clause and may be interpreted narrowly.
- 4.83 The Minister submits that the “key point” of protection from liability should be in the Bill.¹⁴⁰

¹³⁷ SEAVROC Report pp45-8.

¹³⁸ Mon Max Trenorden MLC said: “*The regional subsidiary could go into all the operating processes in terms of rangers — making sure the rangers could go across boundaries, perhaps carrying out other functions and those sorts of things, but the power to prosecute remains with local government.*” (Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p5.)

¹³⁹ SEAVROC Report, p52.

¹⁴⁰ Submission No 3 from the Minister for Local Government, 14 July 2011, p3.

Consequential amendment of other legislation

4.84 Where references are made in other legislation to local governments and RLGs, consideration needs to be given to whether that legislation needs to be amended to ensure regional subsidiaries are subject to, and may have the benefits of, that legislation. An issue raised by the Shire of Dardanup is whether the Bill enables a charter of (or agreement to form) a regional subsidiary operating a landfill site to share the “burden” of contaminated sites legislation amongst its participating councils.¹⁴¹ This requires consideration of the contaminated sites legislation.

4.85 Section 9 of the *Freedom of Information Act 1992 (FOI Act)* provides that a “public body or office” subject to the FOI Act includes:

(d) a local government or a regional local government.

As it will be a separate legal entity, for a regional subsidiary to be subject to the FOI Act, as they are in South Australia, that Act may require amendment.¹⁴²

4.86 The Committee also draws attention to the SEAVROC Report’s observation that if the regional subsidiary model of ‘opting in’ to provisions of the LGA is followed, careful consideration needs to be given not only to the primary legislation that will apply, but whether subsidiary legislation should apply - such as the tendering requirements under the *Local Government (Functions and General) Regulations 1996* or provisions relating to the appointment of Chief Executive Officers.

4.87 Also, consideration needs to be given to the amendment of existing regulations, such as the *Local Government (Financial Management) Regulations 1996*, to provide the safeguards found in South Australian subsidiary legislation.¹⁴³

4.88 As with the application of LGA provisions, the extent to which current regulations will be applied to a regional subsidiary is a policy decision that may have significant impact on the eventual model. Both the Department and Hon Max Trenorden MLC confirmed such consequential amendments may be required for the Bill to have its intended effect.¹⁴⁴

¹⁴¹ Submission No 2 from Shire of Dardanup, 13 July 2013, p1.

¹⁴² Section 4, definition of “agency”, in the *Freedom of Information Act 1991 (SA)*.

¹⁴³ Submission No 16 from Department of Local Government, 20 July 2011, p2. See also Tim Fowler, Special Advisor, Legislation and Reform, Department of Local Government, *Transcript of Evidence*, p9.

¹⁴⁴ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p15 and Mr Tim Fowler, Department of Planning and Local Government, *Transcript of Evidence*, 10 August 2011, p9.

5 ISSUES ARISING FROM OTHER CLAUSES OF THE BILL

Clause 5

- 5.1 Proposed section 3.69(2)(c) provides for regional subsidiaries to be a corporate entity pursuant to regulations, however, clause 5 amends section 3.60 of the LGA to provide (amendment underlined):

No capacity to form or acquire control of body corporate

A local government cannot form or take part in forming, or acquire an interest giving it the control of, an incorporated company or any other body corporate except a regional local government or regional subsidiary unless it is permitted to do so by regulations.

(Committee's emphasis)

- 5.2 This means that the proposed amendment is only necessary if the corporate status of regional subsidiaries is not, in fact, permitted in regulations made under the LGA. Clause 5 seems to suggest that the corporate status is established in the LGA. (Hon Max Trenorden MLC advises that clause 5 is intended to provide a clear distinction between a RLG and a regional subsidiary.)¹⁴⁵
- 5.3 In the event the Bill is amended to state that a regional subsidiary is an incorporated body, no issue arises.

Clause 7

- 5.4 Clause 7 proposes an amendment to section 3.68 of the LGA that results in a replication of section 3.69(4) proposed by clause 8 of the Bill. Section 3.68 of the LGA, which is located in Part 3, Division 4 of that Act, provides:

Nothing in this Division prevents local governments from making arrangements under which —

(a) a local government performs a function for another local government; or

(b) local governments perform a function jointly.

- 5.5 Clause 8 proposes section 3.69 be inserted at the end of Part 3, Division 4 yet section 3.69(4) proposes a repetition of the statement in section 3.68.
- 5.6 This causes some confusion, as well as unnecessary duplication, due to mixed drafting messages. Either section 3.69 is part of Part 3, Division 4, in which case section 3.68

¹⁴⁵ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p1 and the Appendix to that submission.

applies and clause 7 and proposed section 3.69(4) are unnecessary, or it is not, in which case, clause 6 is unnecessary and section 3.69 should be added as a new Division, Division 5.

- 5.7 When the Committee asked Hon Max Trenorden MLC whether proposed clause 3.69(4) was a duplication of section 3.68, he advised that clause 7 is not required.¹⁴⁶

6 CONCLUSION

- 6.1 Hon Max Trenorden MLC has taken a minimalist approach to drafting the Bill.¹⁴⁷ The non-descriptive nature of the Bill is intentional and directed at provision of flexibility to establish a regional subsidiary's compliance obligations and function in its charter.¹⁴⁸

- 6.2 However, this gives rise to the questions noted in paragraph 1.8 - in effect, does the Bill provide sufficient guidance for the intended regional subsidiary arrangement?

- 6.3 To ascertain the purpose of the Bill and compile the summary of the key features of the intended regional subsidiary model in Part 2 of this report, the Committee had to have reference not only to the Second Reading Speech, but to the Second Reading Debate and information provided by Hon Max Trenorden MLC for this inquiry. Only one of the key features noted in Part 2 is suggested by the Bill. As discussed in Part 4, the Committee notes that there are tensions between some of the identified key features of the intended regional subsidiary arrangement and how Hon Max Trenorden MLC sees it operating.

- 6.4 As drafted, the Bill leaves the model that is eventually implemented to a policy decision to be made when making the regulations. From a practical perspective, the differing views as to how regional subsidiaries may, and should, operate increase the potential for a different policy outcome than that intended. The regulations could establish a regime that is not consistent with the intent of the Bill as described by Hon Max Trenorden MLC in his evidence to the Committee or contemplated by Parliament should it pass the Bill.

- 6.5 While there is broad local government sector support for the regional subsidiary concept, the Bill does not provide sufficient detail for any particular stakeholder (or group) to be certain that their intent will be realised.

- 6.6 On this, a court may distinguish between Hon Max Trenorden MLC's intent in proposing the Bill, as clarified in this inquiry, and the Parliament's intent in passing

¹⁴⁶ Letter from Hon Max Trenorden MLC, Legislative Council, 26 August 2011, p1.

¹⁴⁷ Submission No 21 from Hon Max Trenorden MLC, Legislative Council, 26 July 2011, p1.

¹⁴⁸ Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p4, 7 and 10.

the Bill, as expressed in the text of the Bill itself. This may result in some unanticipated regulations being found to be valid or invalid by a court.

6.7 While the Department stated the Bill “*fundamentally*” gave effect to the policy of the Bill as set out in the Second Reading Speech, it advised the Committee that, as well as other matters raised in its submission and that of the Minister, for a regional subsidiary arrangement to work as intended the “*essential characteristics of the model [should] appear in the body of the Act itself, rather than in regulations*”.¹⁴⁹

6.8 The stakeholder views provided to the Committee were in the main consistent with the Minister’s view that “*it is worth investigating ... whether some of the key characteristics*” of the regional subsidiary model should be in the body of the Act but:

*[s]hould it be intended that all essential matters be dealt with by regulation, it is recommended that thought be given to expanding the wording in clause 3.69(2) to foreground some additional important points that would need to be included in the regulation.*¹⁵⁰

FORC, for example, submitted:

*The operation of Regional Subsidiaries relies on both regulation and a charter. Neither of these is known at this time. This could lead to significant variation if left solely to those preparing the charter. There is a preference for the greater part of these matters to be in the legislation.*¹⁵¹

The Western Metropolitan Regional Council submitted:

*The Bill does not appear to give significant direction to the regulation. This is good in principle ... though it defers many of the critical debates to the regulation setting process. Some of those debates may be very important in shaping how local government is to be governed, and may be more appropriately had in Parliament than in the more administrative setting of regulation making.*¹⁵²

6.9 The Committee is of the view that the Bill could be improved by amendment to:

- state that a regional subsidiary is established as corporate body under the LGA;

¹⁴⁹ Letter from Department of Local Government, 29 August 2011, p2.

¹⁵⁰ Submission No 3 from the Minister for Local Government, 14 July 2011, p3.

¹⁵¹ Submission No 24 from Forum of Regional Councils, 2 August 2011, p2.

¹⁵² Submission No 14 from Western Metropolitan Regional Council, 19 July 2011, p1.

- state that an application for approval to establish a regional subsidiary must be accompanied by a charter that is to address the matters specified in the SA Act;
- state that approval to establish a regional subsidiary is to be published by notice in the *Gazette* and that the regional subsidiary is established upon publication;
- state that publication of approval is to be accompanied by publication (also in the *Gazette*) of the regional subsidiary's charter;
- state that an amendment to a regional subsidiary's charter is to be submitted to the Minister for approval, that an amended charter is to be published in the *Gazette* and that the regulations are to specify minimum requirements for review of a charter;
- state that a regional subsidiary may perform functions, including functions under Acts other than the LGA;
- state that a regional subsidiary's board may comprise non-local government members;
- impose either SA Act duty of care and honesty provisions or LGA integrity provisions to non-local government board members and otherwise address conflict of interest and disclosure concerns;
- describe the nature of the subsidiary relationship between the regional subsidiary and its participating councils, clarifying when its governance and compliance obligations are direct and when they are indirect (in a manner similar to that of the SA Act);
- provide direction on the intended approach to commercial undertakings;
- address the extent to which, if any, a regional subsidiary may hold an interest in another corporation;
- apply appropriately amended LGA protection from liability provisions to a regional subsidiary's board and employees;
- apply appropriate LGA provisions conferring powers and duties on local government employees to a regional subsidiary's employees;
- require the regulations to provide criteria for Ministerial approval to establish a regional subsidiary;

- address (whether in the Bill or by requiring the regulations or charter to address) responsibility for liabilities incurred by a regional subsidiary;
 - address a regional subsidiary’s power to delegate;
 - clarify when a matter is to be prescribed and when it may be “*provided for*” in the regulations; and
 - provide direction on consequential amendments to other legislation.
- 6.10 There are also tensions between some SA Act provisions and specific views expressed by Hon Max Trenorden MLC. For example, the SA Act does not require an amendment of the charter of a regional subsidiary to be approved by the Minister, but for it to be reviewed at least every 4 years, which is contrary to the intention of Hon Max Trenorden MLC that an amendment to a charter should be subject to the approval of the Minister.¹⁵³ His reliance on the subordinate relationship between a regional subsidiary and the participating local governments for indirect compliance with the LGA is also not consistent with the SA Act.
- 6.11 There are also stakeholder issues with certain provisions, for example, the SA Act requires the first business plan of a regional subsidiary to be adopted within 6 months of its establishment, whereas the Department prefers the business plan to be submitted to the Minister with the application to establish a regional subsidiary.¹⁵⁴
- 6.12 While noting that many of the ‘practical effect’ issues raised by the Department and other submitters go to the administrative policy of the Bill,¹⁵⁵ Hon Max Trenorden MLC advised the Committee that he is prepared to generally consider its conclusions as to how the Bill could be amended to better effect his intent.¹⁵⁶ This includes amendments to reflect the provisions of the SA Act.¹⁵⁷

Concluding Remarks

- 6.13 The Committee’s term of reference 4.4 states: “*Unless otherwise ordered any amendment recommended by the Committee must be consistent with the policy of a Bill*”.

¹⁵³ Ibid, p4. See also Ms Jennifer Mathews, Director General, Department of Local Government, *Transcript of Evidence*, p19.

¹⁵⁴ Tim Fowler, Special Advisor, Legislation and Reform, Department of Local Government, *Transcript of Evidence*, 10 August 2011, p18. See also Graham Cooper, Chairman, SEAVROC and Shire of Cunderdin, *Transcript of Evidence*, 17 August 2011, p11.

¹⁵⁵ Ibid, p2.

¹⁵⁶ See, for example, Hon Max Trenorden MLC, Legislative Council, *Transcript of Evidence*, 10 August 2011, p3.

¹⁵⁷ Ibid, p9.

- 6.14 Notwithstanding the general support for the regional subsidiary concept identified through submissions and evidence provided to the Committee, the Committee has identified a number of issues that warrant attention. The Committee considers that the non-descriptive nature of the Bill creates uncertainty as to whether its practical effect will be that intended by Hon Max Trenorden MLC and limits Parliament's ability to ensure that regulations made under the Bill implement his intentions.
- 6.15 Given that Hon Max Trenorden MLC has stated that he would take advice from the Committee on improvements to the Bill, the Committee recommends that the matters outlined in Recommendation 1 be addressed prior to the Bill progressing further.

Recommendation 1: The Committee recommends that prior to the Bill progressing further, the matters outlined below be addressed by the Hon Max Trenorden MLC, whether the Bill should:

- state that a regional subsidiary is established as corporate body under the LGA;
- state that an application for approval to establish a regional subsidiary must be accompanied by a charter that is to address the matters specified in the SA Act;
- state that approval to establish a regional subsidiary is to be published by notice in the *Gazette* and that the regional subsidiary is established upon publication;
- state that publication of approval to establish a regional subsidiary is to be accompanied by publication (also in the *Gazette*) of the regional subsidiary's charter;
- state that an amendment to a regional subsidiary's charter is to be submitted to the Minister for approval, that an amended charter is to be published in the *Gazette* and that the regulations are to specify minimum requirements for review of a charter;
- state that a regional subsidiary may perform functions, including functions under Acts other than the LGA;
- that a regional subsidiary's board may comprise non-local government members;

- impose either SA Act duty of care and honesty provisions or LGA integrity provisions to non-local government board members of a regional subsidiary and otherwise address conflict of interest and disclosure concerns;
- describe the nature of the subsidiary relationship between a regional subsidiary and its participating councils, clarifying when its governance and compliance obligations are direct and when they are indirect (in a manner similar to that of the SA Act);
- provide direction on the intended approach to commercial undertakings;
- address the extent to which, if any, a regional subsidiary may hold an interest in another corporation;
- apply appropriately amended LGA protection from liability provisions to a regional subsidiary's board and employees;
- apply appropriate LGA provisions conferring powers and duties on local government employees to a regional subsidiary's employees;
- require the regulations to provide criteria for Ministerial approval for establishment of a regional subsidiary;
- address (whether in the Bill or by requiring the regulations or charter to address) responsibility for liabilities incurred by a regional subsidiary;
- address a regional subsidiary's power to delegate;
- clarify when a matter is to be prescribed and when it may be "*provided for*" in the regulations; and
- provide direction on consequential amendments to other legislation.



Hon Michael Mischin MLC

Chair

29 September 2011

APPENDIX 1
LIST OF SUBMISSIONS (INVITED AND RECEIVED) AND
WITNESSES AT HEARINGS.

APPENDIX 1
LIST OF SUBMISSIONS (INVITED AND RECEIVED) AND
WITNESSES AT HEARINGS

STAKEHOLDERS FROM WHOM THE COMMITTEE INVITED SUBMISSIONS
Hon Max Trenordan MLC
Minister for Local Government
Department of Local Government
Western Australian Local Government Association
All Western Australian Local Governments (138 bodies)
Forum of Regional Councils
Regional Councils - Eastern Metro Regional Council; Mid West Regional Council; Southern Metro Regional Council; Mindarie Regional Council; South West Group; Rivers Regional Council; Tamala Park Regional Council; Western Metro Regional Council; and Pilbara Regional Council
Hon Russell P Wortley MLC, Minister for State/Local Government Relations, South Australia
Department of Planning and Local Government, South Australia
Mr Neil Douglas, McLeods, Barristers & Solicitors

SUBMISSIONS RECEIVED		
No	Office held	Organisation
1	Mr Dean Freeman, Governance Officer	Shire of Capel
2	Mr Mark Chester, Chief Executive Officer	Shire of Dardanup
3	Hon John Castrilli MLA	Minister for Local Government
4	Mr David Smith, Mayor	City of Bunbury
5	Mr Mal Osborne, Chief Executive Officer	Shire of Esperance
6	Mr Chris Fitzhardinge, Director	South West Group
7	Mr Greg Hadlow, Chief Executive Officer	Shire of Kulin
8	Ms Shelley Pike, Chief Executive Officer	Pilbara Regional Council
9	Mr Ryan Duff, Chief Executive Officer	Shire of Williams
10	Mr Kevin Morgan, Mayor	Town of Cottesloe
11	Mr Mark Newman, Chief Executive Officer	City of Mandurah
12	Mr Raymond Davey, Consultant	Private citizen
13	Mr James Trail, Chief Executive Officer	Shire of Kalamunda
14	Mr Adam Johnston, Chief Executive Officer	Western Metropolitan Regional Council
15	Mr Tim Fowler, Governance and Strategy Facilitator	Western Australian Local Government Association
16	Mr Brad Jolley, Acting Director General	Department of Local Government
17	Mr Gary Tuffin, Chief Executive Officer	Shire of Cunderdin
18	Mr Frank Peczka, Chief Executive Officer	Shire of Narembeen
19	Mr Grant Bradbrook, Manager Corporate Support	City of Perth
20	Mr Len Calneggia, Chief Executive Officer	Shire of Wagin
21	Hon Max Trenordan MLC	Member for the Agricultural Region
22	Mr Ian Nightingale, Chief Executive Officer	Department of Planning and Local Government, South Australia

23	Mr Greg Powell, Chief Executive Officer	Shire of Merredin
24	Mayor Ron Norris, Chairman	Forum of Regional Councils

LIST OF WITNESSES		
Hearing Date	Organisation	Witness
10.08.11	Department of Local Government	Ms Jennifer Matthews, Director General Mr Tim Fowler, Special Advisor, Legislation and Reform Policy Ms Vicky Nazer, Acting Manager, Legislation and Reform Policy
	Legislative Council of Western Australia	Hon Max Trenrodan MLC
17.08.11	Western Australian Local Government Association	Mr Wayne Schiegga, Deputy Chief Executive Officer Mr Tony Brown, Executive Manager Governance and Strategy
	Forum of Regional Councils and Rivers Regional Council	Cr Ron Hoffman, Deputy Chair, Forum of Regional Councils Mr Alex Sheridan, Chief Executive Officer, Rivers Regional Council
	Shire of Cunderdin and South East Avon Voluntary Regional Organisation of Councils	Cr Graham Cooper, Councillor Shire of Cunderdin and Chairman, South East Avon Voluntary Regional Organisation of Councils Mr Dominic Carbone, Executive Officer, South East Avon Voluntary Regional Organisation of Councils

APPENDIX 2
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

- 1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?**
- 2. Is the Bill consistent with principles of natural justice?**
- 3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.**
- 4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
- 5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**
- 6. Does the Bill provide appropriate protection against self-incrimination?**
- 7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?**
- 8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?**
- 9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?**
- 10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?**
- 11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?**

Does the Bill have sufficient regard to the institution of Parliament?

- 12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3
***LOCAL GOVERNMENT ACT 1995* (WESTERN
AUSTRALIA): REGIONAL LOCAL GOVERNMENTS**

APPENDIX 3
LOCAL GOVERNMENT ACT 1995 (WESTERN AUSTRALIA):
REGIONAL LOCAL GOVERNMENTS

Division 4 — Regional local governments

3.61. Establishing a regional local government

- (1) Two or more local governments (referred to in this Division as the *participants*) may, with the Minister's approval, establish a regional local government to do things, for the participants, for any purpose for which a local government can do things under this Act or any other Act.
- (2) An application for the Minister's approval is to be —
 - (a) in a form approved for that purpose by the Minister; and
 - (b) accompanied by a copy of an agreement between the participants to establish the regional local government (referred to in this Division as the *establishment agreement*).
- (3) The participants are to supply the Minister any further information about the application that the Minister asks for.
- (4) If the Minister approves the application the Minister is to declare, by notice in the *Gazette*, that the regional local government is established —
 - (a) on the date;
 - (b) under the name; and
 - (c) for the purpose,set out in the notice.

3.62. Constitution and purpose of a regional local government

- (1) A regional local government —
 - (a) is a body corporate with perpetual succession and a common seal; and
 - (b) is to have as its governing body a council established under the establishment agreement and consisting of members of the councils of the participants.
- (2) The purpose for which a regional local government is established (referred to in this Division as the *regional purpose*) is as set out in the establishment agreement.

3.63. Dissolution or partial dissolution of a regional local government

- (1) A regional local government is to be wound up —
 - (a) at the direction of the Minister; or
 - (b) in accordance with the establishment agreement.
- (2) A participant may, in accordance with the establishment agreement, withdraw from the regional local government and cease to be a participant.

3.64. What the establishment agreement is to contain

The following matters are to be set out or provided for in the establishment agreement for a regional local government —

- (a) the name of the regional local government;
- (b) a description of the region for which the regional local government is established;
- (c) the number of offices of member on the council of the regional local government and, in respect of each participant, the number of members to be appointed by that participant;
- (d) the appointment and tenure of members and deputy members of the council of the regional local government;
- (e) the election or appointment of a chairman and deputy chairman of the regional local government from amongst members of its council and the term of office of a chairman and deputy chairman, which is not to exceed 2 years;
- (f) the purpose for which the regional local government is established;
- (g) means of determining the financial contributions of the participants to the funds of the regional local government;
- (h) procedures for the winding up of the regional local government or for the withdrawal of a participant from the regional local government;
- (i) procedures for the division of assets and liabilities between the participants in the event of the regional local government being wound up or a participant withdrawing from the regional local government;
- (j) a means of resolving disputes between participants as to matters relating to the regional local government; and
- (k) any other prescribed matter.

3.65. Amendment of establishment agreement

- (1) The participants may amend the establishment agreement for a regional local government by agreement made with the Minister's approval, and a reference in this Division to the establishment agreement includes a reference to the establishment agreement as so amended.
- (2) The establishment agreement can be amended under subsection (1) to include another local government as a further participant if that local government is a party to the amending agreement.
- (3) Section 3.61(2) and (3) apply, with any necessary modifications, to an agreement amending the establishment agreement.

3.66. Application of enabling Acts to regional local government

- (1) Except as otherwise stated in this section, this Act and any other Act under which anything can be done for the regional purpose apply in relation to a regional local government as if —
 - (a) the participants' districts together made up a single district; and
 - (b) the regional local government were the local government established for that district.
- (2) A regional local government can only do things for the regional purpose, and the application of this Act or any other Act under subsection (1) is limited accordingly.
- (3) The following provisions of this Act do not apply in relation to a regional local government —
 - (a) Part 2 (other than sections 2.7, 2.26, 2.29 and 2.32(e) and Division 7);
 - (b) Part 4;
 - (c) Part 5, Division 2, Subdivision 4;
 - (d) Part 6, Division 6; and
 - (e) any provision prescribed for the purposes of this subsection.
- (4) Part 6, Division 5, Subdivision 3 does not apply in relation to a regional local government unless the establishment agreement provides that it does.
- (5) The provisions that do apply in relation to a regional local government apply to it subject to any prescribed modifications and any other necessary modifications.

3.67. Inconsistency between regional and other local laws

To the extent that a local law made by a regional local government is inconsistent with a local law made by a local government, the local law made by the regional local government prevails.

3.68. Other arrangements not affected

Nothing in this Division prevents local governments from making arrangements under which

- (a) a local government performs a function for another local government; or
- (b) local governments perform a function jointly.

APPENDIX 4
LOCAL GOVERNMENT ACT 1999 (SOUTH AUSTRALIA):
REGIONAL SUBSIDIARIES

APPENDIX 4
LOCAL GOVERNMENT ACT 1999 (SOUTH AUSTRALIA):
REGIONAL SUBSIDIARIES

8.4.2010—Local Government Act 1999
The council as a body corporate—Chapter 4
Fundamental features—Part 1
Committees—Division 2

Division 3—Subsidiaries

42—Ability of council to establish a subsidiary

- (1) A council may establish a subsidiary—
 - (a) to provide a specified service or services; or
 - (b) to manage or administer property, facilities or activities on behalf of the council; or
 - (c) to perform a function of the council under this or another Act.
- (2) A council cannot establish a subsidiary under this section if the primary purpose of the subsidiary would be to perform a regulatory activity of the council.
- (3) The establishment of a subsidiary under this section is subject to obtaining the approval of the Minister to the conferral of corporate status under this Act.
- (4) The establishment of a subsidiary does not derogate from the power of the council to act in a matter.

Note—

Schedule 2 contains other provisions relevant to a subsidiary established by a council under this section.

43—Ability of councils to establish a regional subsidiary

- (1) Two or more councils (the *constituent councils*) may establish a regional subsidiary—
 - (a) to provide a specified service or services or to carry out a specified activity or activities; or
 - (b) to perform a function of the councils under this or another Act.
- (2) If a regional subsidiary is established to perform a regulatory activity of the constituent councils, the subsidiary cannot also perform a significant and related service activity.

Note—

A service activity is related to a regulatory activity if the service is one that is regulated under the regulatory activity.

- (3) The establishment of a regional subsidiary under this section is subject to obtaining the approval of the Minister to the conferral of corporate status under this Act.
- (4) The establishment of a regional subsidiary does not derogate from the power of a constituent council to act in a matter.

Note—

Schedule 2 contains other provisions relevant to a regional subsidiary established by two or more councils under this section.

Part 3—Prudential requirements for certain activities

48—Prudential requirements for certain activities

- (1) A council must obtain and consider a report that addresses the prudential issues set out in subsection (2) before the council—
 - (a) engages in a commercial project (including through a subsidiary or participation in a joint venture, trust, partnership or other similar body) where the expected recurrent or capital expenditure of the project exceeds an amount set by the council for the purposes of this section; or
 - (b) engages in any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body)—
 - (i) where the expected expenditure of the council over the ensuing five years is likely to exceed 20 per cent of the council's average annual operating expenses over the previous five financial years (as shown in the council's financial statements); or

- (ii) where the expected capital cost of the project over the ensuing five years is likely to exceed \$4 000 000.
- (2) The following are prudential issues for the purposes of subsection (1):
 - (a) the relationship between the project and relevant strategic management plans;
 - (b) the objectives of the Development Plan in the area where the project is to occur;
 - (c) the expected contribution of the project to the economic development of the local area, the impact that the project may have on businesses carried on in the proximity and, if appropriate, how the project should be established in a way that ensures fair competition in the market place;
 - (d) the level of consultation with the local community, including contact with persons who may be affected by the project and the representations that have been made by them, and the means by which the community can influence or contribute to the project or its outcomes;
 - (e) if the project is intended to produce revenue, revenue projections and potential financial risks;
 - (f) the recurrent and whole-of-life costs associated with the project including any costs arising out of proposed financial arrangements;
 - (g) the financial viability of the project, and the short and longer term estimated net effect of the project on the financial position of the council;
 - (h) any risks associated with the project, and the steps that can be taken to manage, reduce or eliminate those risks (including by the provision of periodic reports to the chief executive officer and to the council);
 - (i) the most appropriate mechanisms or arrangements for carrying out the project.
- (3) A report is not required under subsection (1) in relation to—
 - (a) road construction or maintenance; or
 - (b) drainage works.
- (4) A report under subsection (1) must be prepared by a person whom the council reasonably believes to be qualified to address the prudential issues set out in subsection (2).
- (5) A report under subsection (1) must be available for public inspection at the principal office of the council once the council has made a decision on the relevant project (and may be available at an earlier time unless the council orders that the report be kept confidential until that time).
- (6) However, a council may take steps to prevent the disclosure of specific information in order to protect its commercial value or to avoid disclosing the financial affairs of a person (other than the council).
- (7) The provisions of this section extend to subsidiaries as if a subsidiary were a council subject to any modifications, exclusions or additions prescribed by the regulations.

Part 4—Conduct and disclosure of interests

Division 1—General duties and code of conduct

62—General duties

- (1) A member of a council must at all times act honestly in the performance and discharge of official functions and duties.
- (2) A member of a council must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties.
- (3) A member or former member of a council must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.
Maximum penalty: \$10 000 or imprisonment for two years.
- (4) A member of a council must not, whether within or outside the State, make improper use of his or her position as a member of the council to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the council.
Maximum penalty: \$10 000 or imprisonment for two years.
- (5) If a person is convicted of an offence against this section, the court by which the person is convicted may, if it thinks that action under this subsection is warranted, in addition to (or in substitution of) any penalty that may be imposed under a preceding subsection, by order do one or more of the following:
 - (a) require the person to attend a specified course of training or instruction, or to take other steps;
 - (b) suspend the person from any office under this Act for a period not exceeding two months;
 - (c) disqualify the person from any office under this Act;
 - (d) disqualify the person from becoming a member of a council, a committee of a council or a subsidiary of a council for a period not exceeding five years.
- (6) If a person is disqualified under subsection (5)(c), the office immediately becomes vacant but proceedings for a supplementary election to fill the vacancy (if required) must not be commenced until the period for appealing against the conviction of an offence against this section has expired or, if there is an appeal, until the appeal has been determined.
- (7) The provisions of this section extend—
 - (a) to committees and to members of committees established by councils as if—
 - (i) a committee were a council; and
 - (ii) a member of a committee were a member of a council; and
 - (b) to subsidiaries and to board members of subsidiaries as if—
 - (i) a subsidiary were a council; and
 - (ii) a board member of a subsidiary were a member of a council.

Division 3—Conflict of interest

73—Conflict of interest

- (1) A member of a council has an interest in a matter before the council if—
- (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non-pecuniary detriment,
- (not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).
- (2) A person is closely associated with a member of a council—
- (a) if that person is a body corporate of which the member is a director or a member of the governing body; or
 - (b) if that person is a proprietary company in which the member is a shareholder; or
 - (c) if that person is a beneficiary under a trust or an object of a discretionary trust of which the member is a trustee; or
 - (d) if that person is a partner of the member; or
 - (e) if that person is the employer or an employee of the member; or
 - (f) if that person is a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or
 - (g) if that person is a relative of the member.
- (3) A member of a council who is a member, officer or employee of an agency or instrumentality of the Crown, will be regarded as having an interest in a matter before the council if the matter directly concerns that agency or instrumentality but otherwise will not be regarded as having an interest in a matter by virtue of being a member, officer or employee of the agency or instrumentality.
- (4) In this section—
- agency or instrumentality of the Crown*** includes—
- (a) an administrative unit of the Public Service;
 - (b) a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.

74—Members to disclose interests

- (1) A member of a council who has an interest in a matter before the council must disclose the interest to the council.
 - (2) A member in making a disclosure under subsection (1) must provide full and accurate details of the relevant interest.
 - (3) A disclosure made under subsection (1) must be recorded in the minutes of the council (including details of the relevant interest).
 - (4) A member of a council who has an interest in a matter before the council must not—
 - (a) propose or second a motion relating to the matter; or
 - (b) take part in discussion by the council relating to that matter; or
 - (c) while such discussion is taking place, be in, or in the close vicinity of, the room in which or other place at which that matter is being discussed; or
 - (d) vote in relation to that matter.
- (4a) The following qualifications apply:
- (a) subsections (1) and (4) do not apply—
 - (i) to questions relating to allowances or benefits that a council is empowered to pay to, or confer on, members, their spouses, domestic partners or members of their families; or
 - (ii) to matters of a class exempted by regulation from the provisions of those subsections; or
 - (iii) to matters in relation to which the Minister has granted an exemption from the provisions of those subsections;
 - (b) a member of a council who has disclosed an interest under subsection (1) may, by permission of the council, attend during proceedings of the council on the relevant matter in order to ask or answer questions, provided that the meeting is open to the public, the member withdraws from the room after asking or answering the questions, and the member does not in any other way take part in any debate or vote on the matter;
 - (d) a member does not contravene this section if the interest was unknown to the member at the relevant time.
- (4b) In addition, subsection (4) does not apply in a case where the interest of the member arises because of 1 or both of the following circumstances:
- (a) the member or a person closely associated with the member is a member of, or director or member of the governing body of, a non-profit association;
 - (b) the member or a person closely associated with the member is a member of a body (whether incorporated or unincorporated) comprised of or including, or having a governing body comprised of or including, a person or persons appointed or nominated by the council.

-
- (5) The fact that a member or members of a council have failed to comply with this section in relation to a particular matter does not, of itself, invalidate a resolution or decision on that matter but, if it appears that the non-compliance may have had a decisive influence on the passing of the resolution or the making of the decision, the District Court may, on the application of the council, the Minister or a person affected by the resolution or decision, annul the resolution or decision and make such ancillary or consequential orders as it thinks fit.
- (5a) In addition to the operation of subsection (5), the Ombudsman may, on the complaint of a person with an interest considered by the Ombudsman to be sufficient in the circumstances, investigate an allegation of a breach of this section.
- (5b) If the Ombudsman decides to conduct an investigation under subsection (5a)—
- (a) the Ombudsman may exercise the powers of the Ombudsman under the *Ombudsman Act 1972* as if carrying out an investigation under that Act, subject to such modifications as may be necessary, or as may be prescribed; and
 - (b) at the conclusion of the investigation, the Ombudsman may prepare a report on any aspect of the investigation and may publish the report, a part of the report, or a summary of the report, in such manner as the Ombudsman thinks fit.
- (6) In this section—
- non-profit association*** means a body (whether corporate or unincorporate)—
- (a) that does not have as its principal object or one of its principal objects the carrying on of a trade or the making of a profit; and
 - (b) that is so constituted that its profits (if any) must be applied towards the purposes for which it is established and may not be distributed to its members,
- and includes the LGA.

75—Application of Division to members of committees and subsidiaries

- (1) The provisions of this Division extend to committees and to members of committees established by councils as if—
 - (a) a committee were a council; and
 - (b) a member of a committee were a member of a council.
- (2) The provisions of this Division extend to subsidiaries and to board members of subsidiaries as if—
 - (a) a subsidiary were a council; and
 - (b) a board member of a subsidiary were a member of a council.

Division 2—Subsidiaries

274—Investigation of a subsidiary

- (1) If the Minister has reason to believe that—
- (a) irregularities or difficulties may exist in the management of a subsidiary or the administration of the affairs of a subsidiary; or
 - (b) a subsidiary has acted outside its charter (see Schedule 2); or
 - (c) a subsidiary may have breached this Act or another law; or
 - (d) some other form of irregularity has occurred in the conduct or management of the affairs of a subsidiary; or
 - (e) some other matter has arisen in relation to the subsidiary that justifies consideration or investigation under this section,
- the Minister may refer the matter to the relevant council or councils for investigation and report.
- (2) If—
- (a) the council or councils do not provide a report to the Minister under subsection (1) within a period specified by the Minister; or
 - (b) the Minister is not satisfied with the outcome of a report to the Minister under subsection (1),
- the Minister may appoint an investigator or investigators to carry out an investigation and to report to the Minister on the matter.
- (3) The Minister must, before making an appointment under subsection (2), give the council or councils a reasonable opportunity to make submissions to the Minister.
- (4) An investigator appointed under subsection (2) may, for the purposes of an investigation—
- (a) require a board member or employee of the subsidiary to answer, orally or in writing, questions put by the investigator to the best of the member's or the employee's knowledge, information and belief;
 - (b) require a person to whom questions are put under paragraph (a) to verify the answers to those questions by declaration;
 - (c) require a person to produce for examination by the investigator books, papers or other records relevant to the subject matter of the investigation;
 - (d) retain books, papers or other records produced under paragraph (c) for such reasonable period as the investigator thinks fit and make copies of any of them or of any of their contents.

- (5) A person who refuses or fails to comply with a requirement under subsection (4) is guilty of an offence.
Maximum penalty: \$10 000.
- (6) A person is not excused from answering a question or from producing books, papers or other records under this section on the ground that to do so might tend to incriminate the person or make the person liable to a penalty.
- (7) However, if compliance by a natural person with a requirement to answer a question or to produce a book, paper or other record might tend to incriminate the person or make the person liable to a penalty—
- (a) in the case of a person who is required to produce a book, paper or record, the book paper or record (as distinct from the contents of the book, paper or record); or
 - (b) in any other case, the answer given in compliance with the requirement, is not admissible in evidence against the person in proceedings for an offence or for the imposition of a penalty (other than proceedings in respect of the making of a false or misleading statement).
- (8) At the conclusion of an investigation by an investigator or investigators appointed under subsection (2) the investigator or investigators must present a written report to the Minister on the results of the investigation.
- (9) The Minister must supply the subsidiary and the council, or constituent councils, with a copy of a report presented under subsection (8).
- (10) No action in defamation lies in respect of the contents of a report under this section.

275—Action on a report

- (1) The Minister may, on the basis of a report under section 274, require that specified action be taken in respect of a subsidiary.
- (2) The Minister must, before imposing a requirement under subsection (1), give the relevant council or councils a reasonable opportunity to make submissions to the Minister.
- (3) The Minister acting under subsection (1) may, for example—
- (a) require the adoption of specified management practices;
 - (b) require that the subsidiary cease a specified activity;
 - (c) require that steps be taken to amend the charter of the subsidiary;
 - (d) require that steps be taken to wind up the subsidiary.

Schedule 2

Part 2—Regional subsidiaries established by two or more councils

17—Application for Ministerial approval

- (1) Two or more councils proposing to establish a regional subsidiary under this Act must apply to the Minister under this Part.
- (2) An application by two or more councils for the approval of the Minister to establish a regional subsidiary must—
 - (a) be in a form approved by the Minister; and
 - (b) be accompanied by information required by the Minister; and
 - (c) be accompanied by a copy of the proposed charter for the subsidiary (see clause 19).
- (3) A subsidiary comes into existence if or when the Minister, by notice in the Gazette, signifies his or her approval of the establishment of the subsidiary.
- (4) The constituent councils must, in conjunction with the publication of a notice under subclause (3), ensure that a copy of the charter of the subsidiary is published in the Gazette.

18—Corporate status

A regional subsidiary established under this Part—

- (a) is a body corporate; and
- (b) has the name assigned to it by its charter; and
- (c) has the powers, functions and duties specified in its charter; and
- (d) holds its property on behalf of the constituent councils.

19—Preparation of charter

- (1) A charter must be prepared for a regional subsidiary by the constituent councils.
- (2) The charter must address—
 - (a) the purpose for which the subsidiary is established;
 - (b) the constitution of a board of management as the subsidiary's governing body and, in respect of the board of management—
 - (i) the method by which board members will be appointed, and their terms of office determined;
 - (ii) the conditions of appointment, or the method by which those conditions will be determined;
 - (iii) the appointment of a board member to chair meetings;
 - (iv) the appointment of deputies to board members;

- (c) whether board members will be required to submit returns under Chapter 5, Part 4, Division 2;
 - (d) the powers, functions and duties of the subsidiary;
 - (e) the nature and scope of any activities that will be undertaken outside the area of the constituent councils;
 - (f) staffing issues, including whether the subsidiary may employ staff and, if so, the process by which conditions of employment will be determined;
 - (g) whether the subsidiary is intended to be partially or fully self-funding, or to have the ability to raise revenue, and other relevant arrangements relating to costs and funding, including the financial contributions to be made by the constituent councils;
 - (h) any special accounting, internal auditing or financial systems or practices to be established or observed by the subsidiary;
 - (i) the acquisition or disposal of assets;
 - (j) the manner in which surplus revenue is to be dealt with by the subsidiary;
 - (k) the nature and scope of any investment which may be undertaken by the subsidiary;
 - (l) the subsidiary's obligations to report on its operations, financial position and other relevant issues, and processes for other forms of reporting to the constituent councils;
 - (m) the process or mechanism by which the subsidiary will be subject to direction by the constituent councils;
 - (n) the manner in which disputes between the constituent councils relating to the subsidiary will be resolved;
 - (o) issues surrounding a council becoming a constituent council, or ceasing to be a constituent council;
 - (p) the manner in which the property of the subsidiary is to be distributed in the event of a winding up;
 - (q) the proportions in which the constituent councils are to be responsible for the liabilities of the subsidiary in the event of its insolvency;
 - (r) other matters contemplated by this Part or prescribed by the regulations.
- (3) The constituent councils may include in the charter other matters that the councils consider to be appropriate.
- (4) The charter may be reviewed by the constituent councils at any time but must in any event be reviewed at least once in every 4 years.
- (5) The constituent councils must, if they amend a charter—
- (a) furnish a copy of the charter, as amended, to the Minister; and
 - (b) ensure that a copy of the charter, as amended, is published in the Gazette.

20—Appointment of board of management

- (1) Subject to the charter of the subsidiary, the membership of a board of management of a regional subsidiary will be determined by the constituent councils and may consist of, or include, persons who are not members of a council.
- (2) A board member is, at the expiration of a term of office, eligible for reappointment.
- (3) The office of board member becomes vacant if the board member—
 - (a) dies; or
 - (b) completes a term of office and is not reappointed; or
 - (c) resigns by written notice addressed to the constituent councils and served on any of them; or
 - (d) becomes a bankrupt or applies for the benefit of a law for the relief of insolvent debtors; or
 - (e) fails to submit a return for the purposes of a Register of Interests in accordance with this Act if such returns are required by the charter; or
 - (f) is removed from office by the constituent councils by written notice, or in any other manner specified by the charter.
- (4) On the office of a board member becoming vacant, a person may be appointed in accordance with the charter to the vacant office.
- (5) A reference in this Act to a board member will be taken to include, unless the contrary intention appears, a reference to a deputy while acting as a board member.
- (6) If a member or employee of a constituent council is appointed as a board member, he or she is not taken to have vacated his or her office as a member of the council, or of the staff of the council, or to have been invalidly appointed to the board of management because—
 - (a) the potential exists for the duties of the two offices to conflict; or
 - (b) the duties of either office require, by implication, the person's full time attention.
- (7) A council may give directions in relation to an actual or potential conflict of duty and duty between offices held concurrently, or in relation to some other incompatibility and, if the person concerned complies with those directions, he or she is excused from any breach that would otherwise have occurred.

21—Proceedings of board of management

- (1) A quorum of a board of management will be determined by the charter of the subsidiary.
- (2) The board member appointed to chair the board of management will preside at meetings of the board of management at which he or she is present and, if that board member is absent from a meeting, another board member chosen by the board members present at the meeting will preside.
- (3) A decision carried by a majority of the votes cast by board members at a meeting is a decision of the board of management.

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- (4) Each board member present at a meeting of the board of management has one vote on a question arising for decision and, if the votes are equal, the board member presiding at the meeting does not have a second or casting vote.
 - (5) A telephone or video conference between board members will, for the purposes of this clause, be taken to be a meeting of the board of management at which the participating board members are present if—
 - (a) notice of the conference is given to all board members in the manner determined by the board of management for that purpose; and
 - (b) each participating board member is capable of communicating with every other participating board member during the conference.
 - (6) A proposed resolution of the board of management becomes a valid decision of the board of management despite the fact that it is not voted on at a meeting if—
 - (a) notice of the proposed resolution is given to all board members in accordance with procedures determined by the board of management; and
 - (b) a majority of the board members express their concurrence in the proposed resolution by letter, telex, facsimile transmission or other written communication, or electronic communication, setting out the terms of the resolution.
 - (7) Unless otherwise determined by the charter of the subsidiary, Chapter 6 Part 3 extends to a subsidiary as if—
 - (a) a subsidiary were a council; and
 - (b) the board members of the subsidiary were members of the council.
 - (8) A person authorised in writing by a constituent council for the purposes of this clause may attend (but not participate in) a meeting of the board of management and may have access to papers provided to board members for the purpose of the meeting.
 - (9) If a board of management considers that a matter dealt with at a meeting attended by a representative of a constituent council should be treated as confidential, the board of management may advise the council of that opinion, giving the reason for the opinion, and the council may, subject to subclause (10), act on that advice as the council thinks fit.
 - (10) If a council is satisfied on the basis of the board of management's advice under subclause (9) that the subsidiary owes a duty of confidence in respect of a matter, the council must ensure the observance of that duty in respect of the matter, but this subclause does not prevent a disclosure as required in the proper performance of the functions or duties of the council.
 - (11) The board of management must cause accurate minutes to be kept of its proceedings.
 - (12) Subject to this clause, and to a direction of the constituent councils, the board of management may determine its own procedures.

22—Specific functions of board of management

- (1) The board of management of a regional subsidiary is responsible for the administration of the affairs of the subsidiary.

- (2) The board of management of a regional subsidiary must ensure as far as practicable—
 - (a) that the subsidiary observes all plans, targets, structures, systems and practices required or applied to the subsidiary by the constituent councils; and
 - (b) that all information furnished to a constituent council is accurate; and
 - (c) that the constituent councils are advised, as soon as practicable, of any material development that affects the financial or operating capacity of the subsidiary or gives rise to the expectation that the subsidiary may not be able to meet its debts as and when they fall due.
- (3) Anything done by the board of management in the administration of the affairs of the subsidiary is binding on the subsidiary.

23—Board members' duty of care etc

- (1) A board member must at all times act with reasonable care and diligence in the performance and discharge of official functions and duties, and (without limiting the effect of the foregoing) for that purpose—
 - (a) must take reasonable steps to inform himself or herself about the subsidiary and relevant aspects of the operations and activities of the constituent councils; and
 - (b) must take reasonable steps through the processes of the board of management to obtain sufficient information and advice about matters to be decided by the board of management or pursuant to a delegation to enable him or her to make conscientious and informed decisions; and
 - (c) must exercise an active discretion with respect to all matters to be decided by the board of management or pursuant to a delegation.
- (2) A board member is not bound to give continuous attention to the affairs of the subsidiary but is required to exercise reasonable diligence in attendance at and preparation for meetings of the board of management.
- (3) In determining the degree of care and diligence required to be exercised by a board member, regard must be had to the skills, knowledge or acumen possessed by the board member and the degree of risk involved in a particular circumstance.
- (4) A board member does not commit a breach of duty under this clause by acting in accordance with a direction from the constituent councils.

24—Business plans

- (1) A regional subsidiary must, in consultation with the constituent councils, prepare and adopt a business plan.
- (2) A subsidiary and the constituent councils must ensure that the first business plan of the subsidiary is prepared within six months after the subsidiary is established.
- (3) A business plan of a subsidiary continues in force for the period specified in the plan or until the earlier adoption by the subsidiary of a new business plan.
- (4) A subsidiary must, in consultation with the constituent councils, review its business plan on an annual basis.

- (5) A subsidiary may, after consultation with the constituent councils, amend its business plan at any time.
- (6) A business plan must set out or include—
 - (a) the performance targets that the subsidiary is to pursue; and
 - (b) a statement of the financial and other resources, and internal processes, that will be required to achieve the subsidiary's performance targets; and
 - (c) the performance measures that are to be used to monitor and assess performance against targets.

25—Budget

- (1) A regional subsidiary must have a budget for each financial year.
- (2) Each budget of a subsidiary—
 - (a) must deal with each principal activity of the subsidiary on a separate basis; and
 - (b) must be consistent with its business plan; and
 - (c) must comply with standards and principles prescribed by the regulations; and
 - (d) must be adopted after 31 May for the ensuing financial year, and before a date fixed by the constituent councils; and
 - (e) must be provided to the constituent councils in accordance with the regulations.
- (3) A subsidiary may, with the approval of the constituent councils, amend its budget for a financial year at any time before the year ends.
- (4) A subsidiary may incur, for a purpose of genuine emergency or hardship, spending that is not authorised by its budget.
- (5) A subsidiary may, in a financial year, after consultation with the constituent councils, incur spending before adoption of its budget for the year, but the spending must be provided for in the appropriate budget for the year.

26—Subsidiary subject to direction by councils

A regional subsidiary is subject to the joint direction and control of the constituent councils.

27—Provision of information

- (1) A regional subsidiary must, at the written request of a constituent council, furnish to the council information or records in the possession or control of the subsidiary as the council may require in such manner and form as the council may require.
- (2) If the board of management of the subsidiary considers that information or a record furnished under this clause contains matters that should be treated as confidential, the board of management may advise the council of that opinion giving the reason for the opinion and the council may, subject to subclause (3), act on that advice as the council thinks fit.

- (3) If the council is satisfied on the basis of the board of management's advice that the subsidiary owes a duty of confidence in respect of a matter, the council must ensure the observance of that duty in respect of the matter, but this subclause does not prevent a disclosure as required in the proper performance of the functions or duties of the council.

28—Reporting

- (1) A regional subsidiary must, on or before a day determined by the constituent councils, furnish to the constituent councils a report on the work and operations of the subsidiary for the preceding financial year.
- (2) A report under subclause (1) must—
 - (a) incorporate the audited financial statements of the subsidiary for the relevant financial year; and
 - (b) contain any other information or report required by the council or prescribed by the regulations.
- (3) A report under subclause (1) must be incorporated into the annual report of each constituent council.

29—Council becoming or ceasing as a constituent council

A council may, in accordance with the charter of the subsidiary and with the approval of the Minister—

- (a) become a constituent council of a regional subsidiary;
- (b) cease to be a constituent council of a regional subsidiary.

30—Internal audit

- (1) A regional subsidiary must establish and maintain effective auditing of its operations.
- (2) A regional subsidiary must, unless exempted by regulation, establish an audit committee.
- (3) Subject to the regulations, an audit committee will comprise persons determined or approved by the constituent councils (and may include persons who are members of a constituent council's audit committee).
- (4) The functions of an audit committee include—
 - (a) reviewing annual financial statements to ensure that they provide a timely and fair view of the state of affairs of the subsidiary; and
 - (b) liaising with external auditors; and
 - (c) reviewing the adequacy of the accounting, internal auditing, reporting and other financial management systems and practices of the subsidiary on a regular basis.

31—Liabilities

- (1) Liabilities incurred or assumed by a regional subsidiary are guaranteed by the constituent councils.

32—Principles of competitive neutrality

If a regional subsidiary is declared by its charter to be involved in a significant business activity, the charter must also specify the extent to which the principles of competitive neutrality¹ are to be applied to the activities of the subsidiary and, to the extent that may be relevant, the reasons for any non-application of these principles.

Note—

1 See Part 4 of the *Government Business Enterprises (Competition) Act 1996*.

33—Winding-up

- (1) A regional subsidiary may be wound up—
 - (a) by the Minister acting at the request of the constituent councils; or
 - (b) by the Minister on the ground that there has been a failure to comply with a requirement of the Minister under section 275 and that the circumstances are, in the opinion of the Minister, sufficiently serious to justify the taking of action to wind up the subsidiary.
- (2) A subsidiary is wound up by the Minister publishing a notice in the Gazette.
- (3) Any assets or liabilities of the subsidiary at the time of winding-up vest in or attach to the constituent councils on the winding-up in accordance with the charter.

Part 3—Common matters**34—Board members' duties of honesty**

- (1) A board member of a subsidiary must at all times act honestly in the performance and discharge of official functions and duties.
- (2) A board member or former board member of a subsidiary must not, whether within or outside the State, make improper use of information acquired by virtue of his or her position as a board member to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the subsidiary or a council.
- (3) A board member of a subsidiary must not, whether within or outside the State, make improper use of his or her position as a board member to gain, directly or indirectly, an advantage for himself or herself or for another person or to cause detriment to the subsidiary or a council.

35—Disclosure

- (1) If a subsidiary discloses to a person in pursuance of this Schedule a matter in respect of which the subsidiary owes a duty of confidence, the subsidiary must give notice of the disclosure to the person to whom the duty is owed.
- (2) A member of the board of management of a subsidiary does not commit a breach of duty by reporting a matter relating to the affairs of the subsidiary to a council or otherwise in accordance with the provisions of this Act.

36—Power of delegation

- (1) A subsidiary may delegate a power or function vested or conferred under this or another Act.

- (2) A delegation may be made—
 - (a) to a committee; or
 - (b) to an employee of the subsidiary or of the council or of a constituent council; or
 - (c) to a person for the time being occupying a particular office or position.
- (3) A delegation—
 - (a) is subject to conditions and limitations determined by the subsidiary or specified by the regulations; and
 - (b) is revocable at will and does not prevent the subsidiary from acting in a matter.
- (4) This clause does not limit or affect a power of delegation under another Act.

37—Common seal and execution of documents

- (1) The common seal of a subsidiary must not be affixed to a document except in pursuance of a decision of the board of management, and the affixing of the seal must be attested by the signatures of two board members.
- (2) The board of management may, by instrument under the common seal of the subsidiary, authorise a board member, or other person (whether nominated by name or by office or title) to execute documents on behalf of the subsidiary subject and limitations (if any) specified in the instrument of authority.
- (3) Without limiting subclause (2), an authority may be given so as to authorise two or more persons to execute documents jointly on behalf of the subsidiary.
- (4) A document is duly executed by the subsidiary if—
 - (a) the common seal of the subsidiary is affixed to the document in accordance with this clause; or
 - (b) the document is signed on behalf of the subsidiary by a person or persons in accordance with authority conferred under this clause.

38—Protection from liability

- (1) No civil liability attaches to a board member of a subsidiary for an honest act or omission in the exercise, performance or discharge, or purported exercise, performance or discharge, of the member's or subsidiary's powers, functions or duties.
- (2) A liability that would, but for this clause, attach to a board member attaches instead to the subsidiary.

39—Interests in companies

- (1) A subsidiary must not—
 - (a) participate in the formation of a company; or
 - (b) acquire shares in a company.
- (2) However, subclause (1) does not limit—
 - (a) the investment of money as authorised by the subsidiary's charter; or

- (b) the ability of a regional subsidiary to participate in the formation of, or to become a member of, a company limited by guarantee established as a national association to promote and advance the interests of an industry in which local government has an interest.

40—Saving provision

No act or proceeding of a subsidiary is invalid by reason of—

- (a) a vacancy or vacancies in the membership of the board of management; or
- (b) a defect in the appointment of a board member.